DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-1062
Title: Chantell Sackett, et vir, Petitioners
v.
Environmental Protection Agency, et al.
Docketed: February 25, 2011
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (08-35854)
Decision Date: September 17, 2010
Rehearing Denied: November 29, 2010

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Feb 23 2011	Petition for a writ of certiorari filed. (Response due March 28, 2011)
Mar 2 2011	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioners.
Mar 23 2011	Order extending time to file response to petition to and including April 27, 2011.
Mar 25 2011	Brief amici curiae of Center for Constitutional Jurisprudence et al. filed.
Mar 28 2011	Brief amicus curiae of American Civil Rights Union filed.
Mar 28 2011	Brief amici curiae of National Association of Home Builders, et al. filed.
Apr 20 2011	Order further extending time to file response to petition to and including May 27, 2011.
Apr 25 2011	Letter of April 21, 2011, from counsel for petitioners received.
May 27 2011	Brief of respondents Environmental Protection Agency, et al. in opposition filed.
Jun 3 2011	Reply of petitioner Chantell Sackett, et vir filed.
Jun 7 2011	DISTRIBUTED for Conference of June 23, 2011.
Jun 23 2011	DISTRIBUTED for Conference of June 27, 2011.
Jun 28 2011	Petition GRANTED limited to the following questions: 1. May petitioners seek pre-enforcement judicial review of the administrative compliance order pursuant to the Administrative Procedure Act, 5 U. S. C. 704? 2. If not, does petitioners inability to seek pre-enforcement judicial review of the administrative compliance order violate their rights under the Due Process Clause?
Jul 6 2011	The time to file the joint appendix and petitioners' brief on the merits is extended to and including September 26, 2011.
Jul 6 2011	The time to file respondents' brief on the merits is extended to and including November 23, 2011.
Sep 23 2011	Joint appendix filed. (Statement of costs filed)
Sep 23 2011	Brief of petitioners Chantell Sackett, et vir filed.
Sep 29 2011	Brief amici curiae of Wet Weather Partnership, et al. filed.

Sep 30 2011	Brief amici curiae of Center for Constitutional Jurisprudence, et al. filed.
Sep 30 2011	Brief amici curiae of National Association of Home Builders, et al. filed.
Sep 30 2011	Brief amici curiae of American Farm Bureau Federation, et al. filed.
Sep 30 2011	Brief amicus curiae of Institute for Justice filed.
Sep 30 2011	Brief amicus curiae of General Electric Co. filed.
Sep 30 2011	Brief amicus curiae of Competitive Enterprise Institute filed.
Sep 30 2011	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Sep 30 2011	Brief amicus curiae of American Civil Rights Union filed.
Sep 30 2011	Brief amicus curiae of National Association of Manufacturers filed.
Sep 30 2011	Brief amicus curiae of Mountain States Legal Foundation filed.
Sep 30 2011	Brief amici curiae of Alaska, et al. filed.
Sep 30 2011	Letter from counsel for amici American Petroleum Institute, et al. proposing to lodge documents related to the Clean Water Act.
Sep 30 2011	Brief amici curiae of American Petroleum Institute, et al. filed.
Oct 3 2011	Brief amicus curiae of APA Watch in support of neither party filed.
Nov 14 2011	SET FOR ARGUMENT ON Monday, January 9, 2012.
Nov 15 2011	CIRCULATED.
Nov 18 2011	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Nov 18 2011	Record from U.S.D.C for District of Idaho is electronic.
Nov 23 2011	Brief of respondents Environmental Protection Agency, et al. filed. (Distributed)
Nov 30 2011	Letter from Natural Resources Defense Counsel, et al., proposing a lodging of relevant FOIA material obtained from the Army Corps of Engineers.
Nov 30 2011	Motion for leave to file amici brief filed by Natural ResourcesDefense Council, et al. (Distributed)
Dec 9 2011	Petitioners' opposition to motion of Natural Resources Defense Council, et al. for leave to file a brief as amici curiae.
Dec 9 2011	Petitioners' objection to lodging proposal of Natural Resource Defense Council, et al.
Dec 15 2011	Reply of Natural Resource Defense Council, et al. to petitioners' opposition to motion to file amici curiae brief.
Dec 15 2011	Reply of Natural Resource Defense Council, et al. to petitioners' opposition to lodging proposal.
Dec 21 2011	Reply of petitioners Chantell Sackett, et vir filed. (Distributed)
Jan 6 2012	Motion for leave to file amici brief filed by Natural Resources Defense Council, et al. GRANTED.
Jan 9 2012	Argued. For petitioners: Damien M. Schiff, Sacramento, Cal. For respondents: Malcolm L. Stewart, Deputy Solicitor General, Department of Justice, Washington, D. C.
Mar 21 2012	Judgment REVERSED and case REMANDED. Scalia, J., delivered the opinion for a unanimous Court. Ginsburg, J., and Alito, J., filed concurring opinions.
Apr 23 2012	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

BRIEFS

FEB 23 2011

OFFICE OF THE CLERK

No. 10-1062

In the

Supreme Court of the United States

CHANTELL SACKETT and MICHAEL SACKETT,

Petitioners,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
and LISA P. JACKSON, Administrator,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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2

QUESTION PRESENTED

Chantell and Michael Sackett own a small lot in a built-out residential subdivision that they graded to build a home. Thereafter, the Sacketts received an Administrative Compliance Order from the Environmental Protection Agency claiming that they filled a jurisdictional wetland without a federal permit in violation of the Clean Water Act. At great cost, and under threat of civil fines of tens of thousands of dollars per day, as well as possible criminal penalties, the Sacketts were ordered to remove all fill, replace any lost vegetation, and monitor the fenced-off site for three years. The Sacketts were provided no evidentiary hearing or opportunity to contest the order. And, the lower courts have refused to address the Sacketts' claim that the lot is not subject to federal jurisdiction.

Do Petitioners have a right to judicial review of an Administrative Compliance Order issued without hearing or any proof of violation under Section 309(a)(3) of the Clean Water Act?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 2

INTRODUCTION 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 8

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE RULE ADOPTED BY THE NINTH CIRCUIT AND SEVERAL OTHER CIRCUITS WILL HAVE A SIGNIFICANT NATIONWIDE IMPACT 8

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE COURTS OF APPEALS 15

CONCLUSION 17

TABLE OF CONTENTS—Continued

Page

APPENDIX

Opinion, filed Sept. 17, 2010 ..... A-1

Mandate, filed Dec. 9, 2010 ..... B-1

Memorandum Order, filed Aug. 7, 2008 ..... C-1

Order, filed Nov. 29, 2010 ..... D-1

Complaint for Declaratory and Injunctive Relief, filed Apr. 28, 2008 ..... E-1

Letter issuing Amended Compliance Order, dated May 15, 2008 ..... F-1

Amended Compliance Order, dated May 15, 2008 ..... G-1

Letter modifying Compliance Order, dated May 1, 2008 ..... H-1

Letter extending deadlines for removal and replacement of wetland soil and re-planting, dated Apr. 4, 2008 ..... I-1

TABLE OF AUTHORITIES

Page

Cases

Atl. States Legal Found., Inc. v. Tyson Foods, Inc., 897 F.2d 1128 (11th Cir. 1990) 16

Block v. Cmty. Nutrition Inst., 467 U.S. 340 (1984) 6

Cotting v. Kansas City Stock Yards Co., 183 U.S. 79 (1901) 10

Ex parte Young, 209 U.S. 123 (1908) 10

Granny Goose Foods v. Bhd. of Teamsters & Auto Truck Drivers, 415 U.S. 423 (1974) 11

Hoffman Group, Inc. v. EPA, 902 F.2d 567 (7th Cir. 1990) 9

Laguna Gatuna, Inc. v. Browner, 58 F.3d 564 (10th Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996) 9

MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118 (2007) 11-12

Rapanos v. United States, 547 U.S. 715 (2006) 13

S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement, 20 F.3d 1418 (6th Cir. 1994), *cert. denied*, 513 U.S. 927 (1994) 9

S. Pines Assocs. v. United States, 912 F.2d 713 (4th Cir. 1990) 9

TABLE OF AUTHORITIES—Continued

Page

Tennessee Valley Authority v. Whitman,
336 F.3d 1236 (11th Cir. 2003) 4, 14-16

Thunder Basin Coal Co. v. Reich,
510 U.S. 200 (1994) 7, 9-10, 13

Statutes

28 U.S.C. § 1254(1) 2

33 U.S.C. § 1311(a) 2

§ 1319(a)(3) 3, 17

§ 1319(c)(1) 10-11

§ 1319(c)(2) 10-11

§ 1319(d) 3, 10

§ 1319(g)(2)(A)-(B) 10

§ 1362(7) 2

§ 1362(12)(A) 2

42 U.S.C. § 7413(a)(3)(B) 16-17

§ 7413(a)(4) 17

§ 7413(d) 16

Regulation

33 C.F.R. § 326.3(e)(1)(ii) 12

Constitution

U.S. Const. amend. V 2

TABLE OF AUTHORITIES—Continued

Page

Rules

Fed. R. App. P. 35(f) 2

Sup. Ct. R. 35.3 1

Miscellaneous

Davis, Andrew I., *Judicial Review of Environmental Compliance Orders*, 24 Envtl. L. 189 (1994) 12

Nichols, Jason D., *Towards Reviving the Efficacy of Administrative Compliance Orders: Balancing Due Process Concerns and the Need for Enforcement Flexibility in Environmental Law*, 57 Admin. L. Rev. 193 (2005) 17

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U.S. EPA, Office of Enforcement and Compliance Assurance, *Clean Water Act Action Plan* (Oct. 15, 2009, rev. Feb. 22, 2010), *available at* http://www.epa.gov/oecaerth/resources/policies/civil/cwa/actionplan101409.pdf (last visited Feb. 17, 2011) 14

TABLE OF AUTHORITIES—Continued

Page

Wynn, Christopher M., Note, *Facing a Hobson's Choice? The Constitutionality of the EPA's Administrative Compliance Order Enforcement Scheme Under the Clean Air Act*, 62 Wash. & Lee L. Rev. 1879 (2005) 12-14

PETITION FOR WRIT OF CERTIORARI

Petitioners Chantell and Michael Sackett respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1]

OPINIONS BELOW

The panel opinion of the Court of Appeals is published at 622 F.3d 1139 (9th Cir. 2010), and included in Petitioners' Appendix (Pet. App.) at A. The panel opinion denying the petition for rehearing *en banc* is not published but is included in Pet. App. at D. The opinion of the district court granting the motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) of Respondents United States Environmental Protection Agency, *et al.* (EPA), is not published but is included in Pet. App. at C.

JURISDICTION

On August 7, 2008, the district court granted EPA's motion to dismiss the Sacketts' action and entered judgment in favor of EPA. The Sacketts filed a timely appeal to the Ninth Circuit Court of Appeals. On September 17, 2010, a panel of the Court of Appeals affirmed the district court's dismissal. The Sacketts then filed a timely petition for rehearing *en banc*. On November 29, 2010, the panel denied the

[1] Pursuant to Supreme Court Rule 35.3, Ms. Jackson has been substituted for Stephen L. Johnson as Administrator of the United States Environmental Protection Agency.

petition, no judge of the Court of Appeals having requested a vote. *See* Fed. R. App. P. 35(f). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. V.

The Clean Water Act provides in pertinent part:

> Except as in compliance with this section and sections [1312, 1316, 1317, 1328, 1342, and 1344 of this title], the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a).

The term "discharge of a pollutant" and the term "discharge of pollutants" each means

> (A) any addition of any pollutant to navigable waters from any point source.

33 U.S.C. § 1362(12)(A).

> The term "navigable waters" means the waters of the United States, including the territorial seas.

33 U.S.C. § 1362(7).

> Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section [1311 of this title], . . . he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

33 U.S.C. § 1319(a)(3).

> Any person who violates . . . any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

33 U.S.C. § 1319(d).

INTRODUCTION

The issue raised by this petition is whether basic principles of due process entitle a landowner who

receives a compliance order from EPA pursuant to the Clean Water Act (CWA) to immediate judicial review of that order. The Ninth Circuit's decision holding that judicial review is unavailable foists an intolerable choice on landowners. According to the decision, landowners who have received a compliance order, and who believe that the compliance order is invalid, can get their day in court only by (1) spending hundreds of thousands of dollars and years applying for a permit that they contend they do not even need, or (2) inviting the agency to bring an enforcement action for potentially hundreds of thousands of dollars in civil penalties for violations of the order, and criminal penalties for underlying violations of the Act. Further, the Ninth Circuit's decision squarely conflicts with the decision of the Eleventh Circuit Court of Appeals in *Tennessee Valley Authority (TVA) v. Whitman*, 336 F.3d 1236 (11th Cir. 2003). For these reasons, more fully explained below, the petition for writ of certiorari should be granted.

STATEMENT OF THE CASE

The Sacketts own an approximately half-acre parcel of land near Priest Lake, Idaho, which they bought for the purpose of building a house. Pet. App. A-2. The lot exists within a built-out area near the Lake. *See* Pet. App. E-2. The lot's north side is bordered by a road, on the other side of which is a ditch. Pet. App. E-2 - E-3. The lot itself has an existing sewer hookup, and is zoned for residential construction. *See* Pet. App. E-2. Prior to their purchase, the Sacketts completed the normal round of

due diligence inspections. None of their research indicated any CWA permitting history or requirements for the property. *See id.* In short, the Sacketts had absolutely no fair reason to believe that their property was regulable under the CWA.

The Sacketts began some earthmoving work with all local building permits in hand. Shortly thereafter, EPA sent the Sacketts a compliance order under the CWA asserting that their property is subject to the CWA, and that they had illegally placed fill material into jurisdictional wetlands on their land. *Cf.* Pet. App. G.[2] The compliance order functions as an injunction that has both prohibitive and mandatory features. As originally issued, it prohibited the Sacketts from pursuing construction of their home on their property, as previously authorized by local authorities. And, it required the Sacketts immediately to begin substantial and costly restoration work, including removal of the fill material, replanting, and a three-year monitoring program during which the property must be left untouched.[3] *See* Pet. App. G-4 - G-5; H-3. Further, the compliance order subjected the Sacketts to significant civil penalties for failure to

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[2] The original compliance order was issued in November, 2007. The order included in Petitioners' Appendix reflects subsequent amendments made by EPA to the original order's schedule for restoration work. *See infra* nn.3-4.

[3] Although the amended compliance order, unlike the original order, does not expressly contemplate a three-year monitoring regime, the amended order nevertheless requires the Sacketts to "restore" the property to its pre-disturbance condition. Pet. App. G-4 - G-6. The Sacketts therefore have every reason to believe that such restoration will not be deemed accomplished by EPA without such a monitoring period. *Cf.* Pet. App. H-3.

abide by its dictates without providing the Sacketts an opportunity to be heard and to contest EPA's findings. *See* Pet. App. G-7.

Believing that their property was not a wetland within the jurisdiction of the United States, the Sacketts requested a hearing to test EPA's jurisdiction over their property; EPA ignored their request. Pet. App. A-3. The Sacketts then filed suit demanding an opportunity to contest the jurisdictional bases for the compliance order.[4] The district court dismissed the suit. *Id.* at C-7. The Sacketts then appealed to the Ninth Circuit.

The panel affirmed the district court's dismissal. The panel decision comprises a three-part analysis. First, the panel analyzed whether the CWA authorizes review of compliance orders. The court acknowledged the general presumption in favor of judicial review of administrative action, but noted that the presumption is overcome " 'whenever the congressional intent to preclude judicial review is fairly discernible in the statutory scheme.' " Pet. App. A-6 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984))). The panel observed that the other courts to have addressed the issue have uniformly held that the CWA precludes review of "pre-enforcement" actions, such as compliance orders. Pet. App. A-6. The panel found those cases persuasive, while relying for support for its conclusion of no "pre-enforcement judicial review" on

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[4] During the pendency of the action in the district court, the Sacketts received amendments to the compliance order, each postponing the due date for the Sacketts to remove the fill and to complete the replanting during the growing season. *See* Pet. App. F-1, H-1, I-1.

the CWA's statutory structure, purposes, and legislative history. *See* Pet. App. A-6 - A-9.

Second, the panel analyzed whether preclusion of pre-enforcement judicial review of compliance orders violates the Sacketts' due process rights. The Sacketts had argued that the CWA on its face purports to allow EPA to enforce a compliance order against a landowner even if there is no jurisdictional basis for the order in the first place. In other words, the Sacketts argued that the CWA attempts to authorize civil liability for violations of compliance orders, regardless of whether the CWA itself has been violated. The court acknowledged that this reading of Section 309(a)(3), adopted by the Eleventh Circuit in *TVA v. Whitman* for an analogous provision of the Clean Air Act, would mean that compliance orders are unconstitutional if they are not subject to judicial review. *See* Pet. App. A-10 - A-11. But the court declined to interpret Section 309(a)(3) according to its plain meaning, instead holding that, if and when EPA chooses to enforce a compliance order in federal court, a landowner may at that time raise a jurisdictional defense. Pet. App. A-11 - A-12.

Third, the panel held that mere delay in judicial review of compliance orders does not "create a 'constitutionally intolerable choice' " which violates a landowner's due process rights. Pet. App. A-13 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994))). A landowner who contests EPA's jurisdiction to issue a compliance order can apply for a permit and seek judicial review of the permit's denial. Pet. App. A-13 - A-14. Further, if and when EPA seeks civil penalties for violation of a compliance order, the

amount of those penalties is left to the equitable discretion of a court, not EPA. Pet. App. A-14 - A-15.

Thus, the panel's decision leaves property owners like the Sacketts in an impossible situation: either go through with the permit process that you believe is completely unnecessary and spend more money than your property is worth to "purchase" your chance at your day in court; or invite an enforcement action by EPA that may give you your day in court but only at the price of ruinous civil penalties and, depending on EPA's ire, criminal sanctions for underlying violations of the CWA. Such a regime as countenanced by the Ninth Circuit would be unconstitutional. For the reasons that follow, review in this Court is merited.

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED BECAUSE THE RULE ADOPTED BY THE NINTH CIRCUIT AND SEVERAL OTHER CIRCUITS WILL HAVE A SIGNIFICANT NATIONWIDE IMPACT

The Ninth Circuit's decision holds that the CWA compliance order regime does not violate landowners' due process rights, even though that regime effectively eliminates any meaningful opportunity for judicial review. The rule that the Ninth Circuit has adopted is consistent with that of four circuits which have already

held against judicial review in these circumstances.[5] For this reason, the rule is functionally nationwide in scope. But the decision below is significant just within the Ninth Circuit, whose jurisdiction covers over 500 million acres. According to the rule adopted below and by four other circuits, a landowner who receives a compliance order and believes that his property is not subject to EPA jurisdiction has two constitutionally "adequate" avenues open to him. One, he can ignore the compliance order at great financial and legal peril to himself and invite EPA to bring an enforcement action against him in court. Two, he can apply for a permit, spending hundreds of thousands of dollars and years in the process, have it denied, then sue over the denial, and perhaps ultimately win, but never be able to recoup the money that he has spent in the process. Neither of these ostensible "options" is constitutionally tolerable.

Although delay in judicial review does not necessarily violate due process, *see Thunder Basin Coal Co. v. Reich*, 510 U.S. at 216 (due process not offended if "neither compliance with, nor continued violation of, the statute will subject petitioner to a serious prehearing deprivation"), deferring judicial review to some undefined point in the future is unconstitutional if "the practical effect of coercive penalties for noncompliance [is] to foreclose all access to the courts," where "compliance is sufficiently onerous and coercive penalties sufficiently potent." *Id.*

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[5] *See Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996); *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418 (6th Cir. 1994), *cert. denied*, 513 U.S. 927 (1994); *S. Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir. 1990); *Hoffman Group, Inc. v. EPA*, 902 F.2d 567 (7th Cir. 1990).

at 218. As this Court observed in *Ex parte Young*, 209 U.S. 123 (1908), requiring "a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts" would effectively "close up all approaches to the courts." *Id.* at 148.[6]

Ignoring the compliance order is no option, for several reasons. First, the CWA imposes significant civil penalties for violating compliance orders. *See* 33 U.S.C. § 1319(d) (imposing maximum civil penalty of $25,000 per day per violation).[7] Just one month of noncompliance puts the landowner at risk of civil liability of **$750,000**. A year's worth of noncompliance puts the liability at **$9,000,000**. Moreover, a landowner who continues with his construction project in the face of a compliance order greatly increases the risk that the agency will seek criminal penalties against him. *See id.* § 1319(c)(1)-(2) (imposing criminal

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[6] *See also Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79, 102 (1901) ("But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts, that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of [his constitutional liberties].").

[7] The CWA authorizes civil fines of up to $32,500 per day for violations of the Act, *see* Pet. App. F-2, and, as noted in the text, $25,000 per day for violations of a compliance order, 33 U.S.C. § 1319(d). The Act also authorizes administrative penalties, assessed by EPA directly in an administrative proceeding, of up to $125,000 total. *See id.* § 1319(g)(2)(A)-(B).

penalties for negligent and knowing violations of the Act).[8]

Contrary to the Ninth Circuit's decision, the assurance of judicial review for any CWA penalties gives cold comfort to landowners. There is no guarantee that a court will approve a *de minimis* fine or penalty, especially in light of the already very high ceilings that the Act authorizes. Given the potential for significant civil penalties (and criminal penalties for violations of the CWA itself), the "option" to pursue judicial review by violating the compliance order, or the Act, or both, is really no option at all.[9] *Cf. MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) ("Given this genuine threat of enforcement, we

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[8] The CWA authorizes: (i) fines of up to $25,000 per day and imprisonment for one year for first time negligent violations of the Act, 33 U.S.C. § 1319(c)(1); (ii) fines of up to $50,000 per day and imprisonment for two years for repeated negligent violations, *id.*; (iii) fines of up to $50,000 per day and imprisonment for three years for knowing violations, *id.* § 1319(c)(2); and (iv) fines of up to $100,000 per day and imprisonment for six years for repeated knowing violations, *id.*

[9] It is noteworthy that EPA claims a power to prohibit and require action by an injunction-like compliance order (without notice and a prompt hearing) that even the federal judiciary does not enjoy. *See Granny Goose Foods v. Bhd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 438-39 (1974) ("The stringent restrictions imposed by . . . Rule 65, on the availability of *ex parte* temporary restraining orders reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute. *Ex parte* temporary restraining orders are no doubt necessary in certain circumstances, but under federal law they should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.") (footnote & citation omitted).

did not require, as a prerequisite to testing the validity of the law in a suit for injunction, that the plaintiff bet the farm, so to speak, by taking the violative action."); Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 Envtl. L. 189, 223 (1994) ("The absence of direct review of compliance orders effectively coerces a recipient to comply with the order under threat of mounting penalties during the period prior to EPA enforcement."); Christopher M. Wynn, Note, *Facing a Hobson's Choice? The Constitutionality of the EPA's Administrative Compliance Order Enforcement Scheme Under the Clean Air Act*, 62 Wash. & Lee L. Rev. 1879, 1920 (2005) ("Certain [compliance orders] can coerce a regulated party into a Hobson's choice: Complying with the order may create an enormous financial burden on a company while the company awaits possible EPA enforcement, while ignoring the order may subject the party to severe criminal and civil penalties.").

Applying for a permit is no help to landowners either, for two reasons. First, in many instances the agencies will not entertain a permit application until the compliance order has been resolved. *See, e.g.*, 33 C.F.R. § 326.3(e)(1)(ii) ("No permit application will be accepted in connection with a violation where the district engineer determines that legal action is appropriate . . . until such legal action has been completed."). For the Sacketts, that would mean (a) removing all the fill; and, (b) restoring the preexisting "wetlands," which would necessitate leaving the property untouched for a prolonged period

of time.[10] *See* Pet. App. G-4 - G-5. Few landowners could afford the cost or the time. Second, the time and money involved in just applying for a permit is significant. *See Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion) ("The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes."). There is no guarantee that the permit will be granted, with or without substantial conditions. And should a landowner succeed in a subsequent lawsuit challenging the agency's permitting jurisdiction, none of the permitting costs would be refundable. *Cf. Thunder Basin*, 510 U.S. at 220-21 (Scalia, J., concurring in part and concurring in the judgment) ("[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs."). Thus, this "option" too is really no option at all.

EPA's use of the compliance order is far from rare: between 1980 and 2001, the agency issued from 1,500 to 3,000 compliance orders every year across the country. Wynn, *supra*, at 1895. EPA's recent practice is somewhat below historical trends. *See* U.S. EPA, Office of Enforcement and Compliance Assurance,

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[10] As noted earlier, *see supra* n.3, the original compliance order contained an express three-year monitoring program during which the property would have to be left untouched.

OECA FY 2008 Accomplishments Report App. B (Dec. 2008)[11] (1,390 compliance orders issued). But given the agency's recent public commitment to increasing its enforcement program,[12] there is every expectation that EPA's reliance on the compliance order will continue and increase. That reliance is troubling when one considers that, as of the late 1990s, EPA referred only about 400 cases annually for judicial enforcement to the Department of Justice. Wynn, *supra*, at 1895. These statistics imply that EPA circumvents the normal avenues of enforcement through courts, by in their place using essentially unreviewable administrative orders to compel landowners to comply with the agency's dictates.

The Ninth Circuit reasoned that the Sacketts and other innocent landowners have no right of access to a federal court because no formal action has yet been brought to sanction them. But that assessment ignores the realities of the Sacketts' and other landowners' circumstances, in its implicit assumption that the Sacketts (and all citizens in similar situations) can afford to defy an order, backed by threats of severe financial penalty, issued by the United States government, and simply await an action for sanctions. The reality of the Sacketts' situation is that they have been unambiguously commanded by their government not to complete their home-building project, to take

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[11] *Available at* http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy08accomplishment.pdf (last visited Feb. 17, 2011).

[12] *See generally* U.S. EPA, Office of Enforcement and Compliance Assurance, *Clean Water Act Action Plan* (Oct. 15, 2009, rev. Feb. 22, 2010), *available at* http://www.epa.gov/oecaerth/resources/policies/civil/cwa/actionplan101409.pdf (last visited Feb. 17, 2011).

expensive measures to undo the improvements that they have made to their land, and to maintain their land essentially as a public park until the property is "restored" to the satisfaction of the EPA. They have been threatened with frightening penalties if they do not immediately obey; but they have been refused the prompt hearing they should have received as a matter of right in any court. Thousands of landowners across the country are in similar straights. This Court's review is merited.

II

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE COURTS OF APPEALS

Essential to the Ninth Circuit's holding that the CWA's compliance order regime does not violate due process was the court's interpretation of Section 309(a)(3) to permit property owners to raise a jurisdictional defense if and when EPA decides to seek in court enforcement of a compliance order, or penalties for its violation. Pet. App. A-11 - A-12. The Ninth Circuit's interpretation of Section 309(a)(3) directly conflicts with the Eleventh Circuit's decision in *TVA v. Whitman*. Although *TVA* dealt with the Clean Air Act (CAA) compliance order regime, the Eleventh Circuit expressly noted that the two statutory regimes are, for the issues presented here, substantively identical. *See TVA*, 336 F.3d at 1256 n.32

In *TVA*, EPA issued a CAA compliance order against TVA, which the latter refused to abide by on the theory that it could not be sued in federal court. The Eleventh Circuit held that enforcement of the compliance order would violate the Due Process Clause

because the CAA did not afford any basis for contesting the compliance order. *See id.* at 1258. Under the CAA, as under the CWA, EPA may issue a compliance order, on the basis of "any information available" to the agency, that the CAA has been violated, and thereupon require a regulated party to conform its conduct accordingly. *See* 42 U.S.C. § 7413(a)(3)(B). Further, the CAA, just as the CWA, authorizes the assessment of civil penalties for violations of compliance orders. *Id.* § 7413(d). *See TVA*, 336 F.3d at 1242. Critical to the Eleventh Circuit's holding that CAA compliance orders are unconstitutional was its conclusion that CAA compliance orders have the force of law and impose liability independent of the statute. *See TVA*, 336 F.3d at 1255-56. Under the plain logic of *TVA*, that conclusion holds for CWA compliance orders as well.

The Ninth Circuit acknowledged that its interpretation of CWA Section 309(a)(3) was contrary to the Eleventh Circuit's reading, but reasoned that the statutory language "is 'not a model of clarity,'" and that the language could—and should—be interpreted in a way that would avoid unconstitutionality. Pet. App. A-11 (quoting *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1137 (11th Cir. 1990)). Yet in response to this "avoidance" approach, the Eleventh Circuit was clear: "no canon of statutory interpretation can trump the unambiguous language of a statute." *TVA*, 336 F.3d at 1255. The statutory language, according to the Eleventh Circuit, unambiguously precludes the recipient of a compliance order from raising a jurisdictional defense. and for that reason the compliance order cannot be enforced without first giving the order's recipient an

opportunity to contest it.[13] *Cf.* Jason D. Nichols, *Towards Reviving the Efficacy of Administrative Compliance Orders: Balancing Due Process Concerns and the Need for Enforcement Flexibility in Environmental Law*, 57 Admin. L. Rev. 193, 215 (2005) ("[T]he *TVA* opinion . . . deserves credit for observing the constitutional frailties of the EPA's [compliance order] process."). This clear conflict between the Ninth Circuit's decision and the Eleventh Circuit's decision in *TVA* merits this Court's review.

CONCLUSION

The EPA's compliance order regime puts the Sacketts, and innocent landowners like them throughout the country, in an impossible situation. To get their day in court, these landowners must either

[13] The CAA provides in relevant part that "whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated, or is in violation of, any other requirement or prohibition of this title . . . , the Administrator may . . . issue an order requiring such person to comply with such requirement or prohibition." 42 U.S.C. § 7413(a)(3)(B). The CWA provides in relevant part that "[w]henever on the basis of any information available to him the Administrator finds that any person is in violation of [various provisions of the Act], he shall issue an order requiring such person to comply with such section or requirement . . . ." 33 U.S.C. § 1319(a)(3). Hence, the Eleventh Circuit's conclusion that the two statutory compliance order regimes are essentially the same is substantiated by the statutes' plain meaning. In fact, the CAA regime is on its face *less* offensive to due process principles than the CWA regime, because the former generally requires the EPA Administrator to provide notice before issuing a compliance order. *see* 42 U.S.C. § 7413(a)(4), whereas the CWA has no such requirement.

run the risk of ruinous penalties and imprisonment, or "purchase" their right of judicial review through the permit process, even if the purchase price is more than the value of their land. If the Sacketts and other landowners are not given an opportunity for full judicial review of their compliance order free of EPA's onerous conditions, their due process rights will be violated. This Court's review is needed.

The petition for writ of certiorari should be granted.

DATED: February, 2011.

Respectfully submitted,

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TABLE OF CONTENTS

Opinion, filed Sept. 17, 2010 . . . . . A-1

Mandate, filed Dec. 9, 2010 . . . . . B-1

Memorandum Order, filed Aug. 7, 2008 . . . . . C-1

Order, filed Nov. 29, 2010 . . . . . D-1

Complaint for Declaratory and Injunctive Relief, filed Apr. 28, 2008 . . . . . E-1

Letter issuing Amended Compliance Order, dated May 15, 2008 . . . . . F-1

Amended Compliance Order, dated May 15, 2008 . . . . . G-1

Letter modifying Compliance Order, dated May 1, 2008 . . . . . H-1

Letter extending deadlines for removal and replacement of wetland soil and re-planting, dated Apr. 4, 2008 . . . . . I-1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHANTELL SACKETT; MICHAEL SACKETT, *Plaintiffs - Appellants,* v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; STEVEN L. JOHNSON, Administrator, *Defendants - Appellees.*	No. 08-35854 D.C. No. 2:08-cv-00185-EJL **OPINION**

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued and Submitted
December 9, 2009
Submission Withdrawn December 23, 2009
Resubmitted August 18, 2010
Seattle, Washington

Filed September 17, 2010

Before: Robert R. Beezer, Ronald M. Gould and
Richard C. Tallman, Circuit Judges

Opinion by Judge Gould

COUNSEL

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OPINION

GOULD, Circuit Judge:

We determine whether federal courts have subject-matter jurisdiction to conduct review of administrative compliance orders issued by the Environmental Protection Agency pursuant to the Clean Water Act, 33 U.S.C. § 1319(a)(3), before the EPA has filed a lawsuit in federal court to enforce the compliance order. We join our sister circuits and hold that the Clean Water Act precludes pre-enforcement judicial review of administrative compliance orders, and that such preclusion does not violate due process.

I

Chantell and Michael Sackett ("the Sacketts") own a 0.63-acre undeveloped lot in Idaho near Priest Lake ("the Parcel"). In April and May of 2007, the Sacketts filled in about onehalf acre of that property with dirt and rock in preparation for building a house.

On November 26, 2007, the EPA issued a compliance order against the Sacketts. The compliance order alleged that the Parcel is a wetland subject to the Clean Water Act ("CWA") and that the Sacketts violated the CWA by filling in their property without first obtaining a permit.[1] The compliance order required the Sacketts to remove the fill material and restore the Parcel to its original condition. The compliance order states that "[v]iolation of, or failure to comply with, the foregoing Order may subject Respondents to (1) civil penalties of up to $32,500 per day of violation . . . [or] (2) administrative penalties of up to $11,000 per day for each violation."

The Sacketts sought a hearing with the EPA to challenge the finding that the Parcel is subject to the CWA. The EPA did not grant the Sacketts a hearing and continued to assert CWA jurisdiction over the Parcel. The Sacketts then filed this action in the United States District Court for the District of Idaho seeking injunctive and declaratory relief. They challenged the compliance order as (1) arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A); (2) issued without a hearing in violation of the Sacketts' procedural due process rights; and (3) issued on the basis of an "any information available" standard that is unconstitutionally vague.

The district court granted the EPA's Federal Rule of Civil Procedure 12(b)(1) motion to dismiss the Sacketts' claims for lack of subject-matter jurisdiction. It concluded that the CWA precludes judicial review of

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[1] The compliance order charged the Sacketts with discharging pollutants into the waters of the United States, absent a permit, in violation of 33 U.S.C. § 1311(a).

compliance orders before the EPA has started an enforcement action in federal court. The Sacketts filed a Federal Rule of Civil Procedure 59(e) motion for clarification and reconsideration that was also denied. The Sacketts appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II

We review de novo the dismissal of a complaint for lack of subject-matter jurisdiction. *Mangano v. United States*, 529 F.3d 1243, 1245 n.2 (9th Cir. 2008).

The EPA has determined that the Sacketts discharged pollutants into the waters of the United States in violation of the CWA. When the EPA identifies a CWA violation, it has three main civil enforcement options.[2] First, it can assess an administrative penalty. 33 U.S.C. § 1319(g). When the EPA assesses an administrative penalty, the alleged violator is entitled to "a reasonable opportunity to be heard and to present evidence," the public is entitled to comment, and any assessed penalty is subject to immediate judicial review. 33 U.S.C. § 1319(g)(4), (8). Second, the EPA can initiate a civil enforcement action in federal district court. 33 U.S.C. § 1319(b). Third, the EPA can issue, as it did here, an administrative "compliance order." 33 U.S.C. § 1319(a).

A compliance order "is a document served on the violator, setting forth the nature of the violation and specifying a time for compliance with the Act." *S. Pines Assocs. by Goldmeier v. United States*, 912 F.2d 713, 715 (4th Cir. 1990). The EPA derives its power to issue compliance orders from 33 U.S.C. § 1319(a)(3), which states:

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[2] Criminal penalties are also available. 33 U.S.C. § 1319(c).

> Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, . . . he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with [33 U.S.C. § 1319(b)].

[1] To enforce a compliance order, the EPA must bring an enforcement action in federal court under 33 U.S.C. § 1319(b). The compliance order issued against the Sacketts exposed them to potential court-imposed civil penalties not to exceed $32,500 "per day for each violation" of the compliance order.[3] 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4. In assessing the amount of the penalty, courts "shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." 33 U.S.C. § 1319(d).

The Sacketts argue that compliance orders are judicially reviewable prior to the EPA filing an enforcement action in federal court. The CWA, however, does not expressly provide for pre-enforcement judicial review of compliance orders. *See* 33 U.S.C. § 1319. The Sacketts argue that federal courts are nonetheless authorized to conduct pre-enforcement review of compliance orders pursuant to the APA. Under the APA, "[a]gency action made reviewable by statute and final agency action for which

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[3] The maximum per-day penalty amount increased to $37,500 effective January 12, 2009. 40 C.F.R. § 19.4.

there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Agency action is not reviewable under the APA, however, where the relevant statute "preclude[s] judicial review." 5 U.S.C. § 701(a)(1).

[2] Whether the CWA precludes pre-enforcement review of compliance orders is an issue of first impression in our circuit. We begin with the presumption favoring judicial review of administrative action. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977). That presumption is overcome, however, "whenever the congressional intent to preclude judicial review is fairly discernible in the statutory scheme." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984) (quotation marks omitted). "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Id.* at 345. The CWA does not expressly preclude preenforcement judicial review of such compliance orders. So we must consider the other factors identified by the Supreme Court to determine whether the CWA impliedly precludes pre-enforcement judicial review.

[3] In this assessment, we do not work from a blank slate. Every circuit that has confronted this issue has held that the CWA impliedly precludes judicial review of compliance orders until the EPA brings an enforcement action in federal district court. *See, e.g., Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995); *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418 (6th

Cir. 1994); *S. Pines Assocs. by Goldmeier v. United States*, 912 F.2d 713 (4th Cir. 1990); *Hoffman Group, Inc. v. EPA*, 902 F.2d 567 (7th Cir. 1990). Many district courts have also so held. *See, e.g., Sharp Land Co. v. United States*, 956 F. Supp. 691, 693-94 (M.D. La. 1996); *Child v. United States*, 851 F. Supp. 1527, 1533 (D. Utah 1994); *Bd. of Managers, Bottineau Cnty. Water Res. Dist. v. Bornhoft*, 812 F. Supp. 1012, 1014-1015 (D.N.D. 1993); *McGown v. United States*, 747 F. Supp. 539, 542 (E.D. Mo. 1990); *Fiscella & Fiscella v. United States*, 717 F. Supp. 1143, 1146-47 (E.D. Va. 1989). The reasoning of these courts is persuasive to us, as well as the broad uniformity of consensus on this issue.

[4] First, we look to the structure of the statutory scheme and the nature of the administrative action involved. Here, Congress gave the EPA a choice of "issu[ing] an order requiring such person to comply with such section or requirement, or . . . bring[ing] a civil action [in district court]." 33 U.S.C. § 1319(a)(3) (emphasis added). Authorizing pre-enforcement judicial review of compliance orders would eliminate this choice by enabling those subject to a compliance order to force the EPA to litigate all compliance orders in court. *E.g.*, Hoffman Group, 902 F.2d at 569. Such a result would be discordant with the statutory scheme.

[5] Moreover, no sanctions can be imposed, or injunctions issued, for noncompliance with a compliance order until the EPA brings a civil enforcement action in district court. *See* 33 U.S.C. § 1319(d); *Hoffman Group*, 902 F.2d at 569. Given that an enforcement action gives an opportunity for judicial consideration of the compliance order, we infer that

Congress intended that all challenges to the compliance order be brought in one proceeding. *See id.*; *cf. Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981) ("In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.").

[6] In addition, by contrast to how it treated compliance orders, Congress set forth an explicit mechanism for judicial review of administrative penalties assessed by the EPA for CWA violations. *See* 33 U.S.C. § 1319(g)(8). Congress's express grant of judicial review for administrative penalties helps to persuade us that the absence of a similar grant of judicial review for compliance orders was an intentional omission that must be respected. *See S. Ohio Coal Co.*, 20 F.3d at 1426.

[7] Second, we look to the objectives of the statutory scheme. Here, courts have concluded that compliance orders, like pre-enforcement administrative orders in other environmental statutes, are meant to "allow EPA to act to address environmental problems quickly and without becoming immediately entangled in litigation." *S. Pines Assocs.*, 912 F.2d at 716; *see also* S. Rep. No. 92-414, at 3730 (1972) ("One purpose of these new requirements is to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement. Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay."). This goal of enabling swift corrective action would be defeated by permitting immediate judicial review of compliance orders.

[8] Third, we consider the legislative history of the CWA. The enforcement provisions of the CWA were modeled on enforcement provisions in the Clean Air Act ("CAA"), and many courts have relied on similar provisions in the CAA in concluding that the CWA precludes pre-enforcement judicial review of compliance orders. *Laguna Gatuna*, 58 F.3d at 565; *S. Pines Assocs.*, 912 F.2d at 716; *see also* S. Rep. No. 92-414, at 3730. During the enactment of the CAA, the Conference Committee which reconciled the House and Senate versions of the CAA deleted a provision in the Senate's version of the bill that would have expressly provided for preenforcement review of CAA administrative compliance orders. *See Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885, 890 (8th Cir. 1977). At least one court has inferred from this deletion that it was intended to preclude pre-enforcement judicial review of compliance orders. *See id.* (citing *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974)). Such an inference is not unassailable. *See* Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 Envt'l L. 189, 199 (1994). Nevertheless, and subject to the general caution with which we must view all legislative history not adopted by both houses and enacted as law, that inference is supported by the structure of the CWA and its statutory language discussed above.

[9] In view of the above considerations, we hold that a congressional intent to preclude pre-enforcement judicial review of compliance orders is "fairly discernible in the statutory scheme." *Block*, 467 U.S. at 351.

III

[10] The Sacketts argue that CWA compliance orders must be judicially reviewable before enforcement because preclusion of pre-enforcement review violates their due process rights. They rely on the Eleventh Circuit's opinion in *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236 (11th Cir. 2003) [hereinafter *TVA*], in which that court identified constitutional problems with a similar compliance-order provision in the CAA, *see id.* at 1260. The Eleventh Circuit concluded that the complete preclusion of judicial review of compliance orders issued under the CAA would raise serious constitutional questions where compliance orders, "if ignored, lead[ ] automatically to the imposition of severe civil penalties and perhaps imprisonment." *Id.* at 1256. The chief problem with the CAA, as the Eleventh Circuit saw it, was that a compliance order could be issued by the EPA "on the basis of any information available" without any hearing, and that the CAA made civil and criminal penalties dependent on violations of compliance orders whether or not there was an actual violation of the CAA. *See id.* (citing Davis, *supra* at 194 ("Regardless of the merits of the alleged violation underlying the compliance order, disregarding the order potentially subjects the recipient to accruing daily penalties.")).

[11] If the CWA is read in the literal manner the Sacketts suggest, it could indeed create a due process problem. Like the CAA, the CWA permits the EPA to issue compliance orders "on the basis of any information available," 33 U.S.C. § 1319(a)(3), which presumably includes "a staff report, newspaper clipping, anonymous phone tip, or anything else that

would constitute 'any information,' " *TVA*, 336 F.3d at 1241 (observing that "[t]he standard is less rigorous than the probable cause standard"). And according to the plain text of the enforcement provision, "any person who violates any order issued by the Administrator under [33 U.S.C. § 1319(a)], shall be subject to a civil penalty . . . for each violation." 33 U.S.C. § 1319(d). Thus, the Sacketts' reading of the CWA suggests that they risk substantial financial penalties for violating the compliance order, even if they did not violate the CWA, if the EPA establishes in an enforcement proceeding that the compliance order was validly issued based on "any information available." *See TVA*, 336 F.3d at 1259 (concluding that "[t]he district courts serve as forums for the EPA to conduct show-cause hearings").

[12] We decline to interpret the CWA in this manner. The civil penalty provision of the CWA is "not a model of clarity." *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1137 (11th Cir. 1990). Although the term "any order" in 33 U.S.C. § 1319(d) could be interpreted to refer to all compliance orders issued on the basis of "any information available," the term could also be interpreted to refer only to those compliance orders that are predicated on actual, not alleged, violations of the CWA, as found by a district court in an enforcement action according to traditional civil evidence rules and burdens of proof.

[13] Mindful of the Supreme Court's repeated instruction that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality," *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S.

648, 657 (1895)), we believe that the latter interpretation is the better interpretation of "any order" in § 1319(d). The EPA is authorized only "to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which [the EPA] is authorized to issue a compliance order." 33 U.S.C. § 1319(b) (emphasis added). Read carefully, this provision does not authorize the EPA to bring enforcement actions for mere violations of compliance orders. Rather, to enforce a compliance order, the EPA must bring an action alleging a violation of the CWA itself. Given that the CWA does not empower the EPA to bring an enforcement action on the basis of a violation of a compliance order alone, it follows that a court cannot assess penalties for violations of a compliance order under § 1319(d) unless the EPA also proves, by a preponderance of the evidence, that the defendants actually violated the CWA in the manner alleged.[4] Under this interpretation, if the EPA does not prove that the CWA was actually violated, the compliance order is unenforceable, even if it was validly issued on the basis of "any information available." We therefore hold that the term "any order" in § 1319(d) refers only to orders predicated on actual violations of the CWA as identified by a district court in an enforcement proceeding according to traditional rules of evidence and standards of proof.

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[4] This interpretation of the term "any order" is in accord with other circuits' readings of the CWA. *See, e.g., Hoffman Group*, 902 F.2d at 569 ("Hoffman cannot be compelled to comply with the Compliance Order without an opportunity to challenge the Order's validity in court."); *S. Pines Assocs.*, 912 F.2d at 717 ("Southern Pines and Vico can contest the existence of EPA's jurisdiction if and when EPA seeks to enforce the penalties provided by the Act.").

The Sacketts further allege that forcing them to wait until the EPA brings an enforcement action "ignores the realities of [their] circumstances," because of the "frightening penalties" they risk accruing by refusing to comply. The increase in penalties from noncompliance with an administrative order not subject to immediate judicial review, however, does not necessarily constitute a due process violation. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994) ("Although the [Mine] Act's civil penalties unquestionably may become onerous if petitioner chooses not to comply, the Secretary's penalty assessments become final and payable only after full review by both the Commission and the appropriate court of appeals."). Rather, statutory preclusion of pre-enforcement judicial review of administrative orders violates due process only when the "practical effect of coercive penalties for noncompliance [is] to foreclose all access to the courts" so that "compliance is sufficiently onerous and coercive penalties sufficiently potent that a constitutionally intolerable choice might be presented." *Id.*

[14] We are not persuaded that the potential consequences from violating CWA compliance orders are so onerous so as to "foreclose all access to the courts" and create a "constitutionally intolerable choice." We reach this conclusion for two reasons. First, the CWA has a permitting provision. *See* 33 U.S.C. § 1344(a). The Sacketts could seek a permit to fill their property and build a house, the denial of which would be immediately appealable to a district court under the APA. *See* 33 C.F.R. § 331.10; 5 U.S.C. § 704. If the Sacketts were denied a permit and then took an appeal, they could challenge whether their property is subject to the jurisdiction of the CWA. *See*

id.; *Baccarat Fremont Devs., LLC v. U.S. Army Corps of Eng'rs*, 425 F.3d 1150, 1154 (9th Cir. 2005) (concluding that the Army Corps had jurisdiction over the plaintiff's property under the CWA). Therefore, rather than completely foreclosing the Sacketts' ability to use their property or challenge CWA jurisdiction, the CWA channels judicial review through the affirmative permitting process. *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 19 (2000) (noting the distinction "this Court has often drawn between a total preclusion of review and postponement of review" and highlighting similar "channeling requirement[s]"); *United States v. Dunifer*, 219 F.3d 1004, 1008 (9th Cir. 2000) ("[I]t is important to note that this is not a case in which Dunifer had no means to obtain judicial review of the regulations. Dunifer could have applied for a license and sought a waiver of the applicable FCC rules . . . ." (citing *Thunder Basin*, 510 U.S. at 212-13)).

[15] Second, the civil penalties provision is committed to judicial, not agency, discretion. *See* 33 U.S.C. § 1319(d). The amount of the penalty for noncompliance with a CWA compliance order is to be determined by a court and is determined on the basis of six factors: (1) the seriousness of the violation, (2) the economic benefit resulting from the violation, (3) any history of CWA violations, (4) good-faith efforts to comply, (5) the economic impact of the penalty on the violator, and (6) such other matters as justice may require. *Id.* Any penalty ultimately assessed against the Sacketts would therefore reflect a discretionary, judicially determined penalty, taking into account a wide range of case-specific equitable factors, and imposed only after the Sacketts have had a full and

fair opportunity to present their case in a judicial forum.

[16] We therefore hold that precluding pre-enforcement judicial review of CWA compliance orders does not violate due process.

IV

In conclusion, we hold that it is "fairly discernable" from the language and structure of the Clean Water Act that Congress intended to preclude pre-enforcement judicial review of administrative compliance orders issued by the EPA pursuant to 33 U.S.C. § 1319(a)(3). We further interpret the CWA to require that penalties for noncompliance with a compliance order be assessed only after the EPA proves, in district court, and according to traditional rules of evidence and burdens of proof, that the defendants violated the CWA in the manner alleged in the compliance order. Thus we do not see any sharp disconnect between the process given a citizen and the likely penalty that can be imposed under the CWA. Under these circumstances, preclusion of pre-enforcement judicial review does not violate the Sacketts' due process rights. The district court properly dismissed this case for lack of subject-matter jurisdiction.[5]

AFFIRMED.

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[5] Given this conclusion, we need not and do not reach the claims of due process violations based on the failure to provide notice and a hearing before an impartial tribunal or the contention that the CWA compliance order provision is impermissibly vague.

Appendix B–1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED Dec. 9, 2010

CHANTELL SACKETT and MICHAEL SACKETT,
Plaintiffs - Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and STEVEN L. JOHNSON, Administrator,
Defendants - Appellees.

No. 08-35854

D.C. No. 2:08-cv-00185-EJL

U.S. District Court for Idaho, Boise

MANDATE

The judgment of this Court, entered September 17, 2010, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

Gabriela Van Allen
Deputy Clerk

Appendix C–1

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO,

NORTHERN DIVISION

FILED Aug. 7, 2008

CHANTELL and MICHAEL SACKETT, Plaintiffs,	)	Case No. 08-cv-185-N -EJL
	)	**MEMORANDUM**
v.	)	**ORDER**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; and STEPHEN L. JOHNSON, in his official capacity as Administrator of the Environmental Protection Agency, Defendants.	)	

Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendant United States Environmental Protection Agency ("EPA") moves to dismiss this action for lack of subject matter jurisdiction. Plaintiffs Chantell and Michael Sackett oppose the motion. Having fully reviewed the record, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, this

matter shall be decided on the record before this Court without oral argument.

Background

Plaintiffs own a parcel of undeveloped property located at 1604 Kalispell Bay Road, near Kalispell Creek, in Bonner County, Idaho. On November 26, 2007, EPA issued to Plaintiffs an Administrative Compliance Order ("Compliance Order")[1] pursuant to sections 308 and 309(a) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1318 and 1319(a). The Compliance Order charged that Plaintiffs, or persons acting on their behalf, had violated section 301 of the CWA, 33 U.S.C. § 1311, by discharging fill material into regulated waters without first obtaining a permit. The Compliance Order required Plaintiffs to remove the fill material and restore the wetlands, and set forth a schedule for the removal of the fill material and replanting of the disturbed area.

The Compliance Order was revised by the EPA on April 4, 2008 and again on May 1, 2008, to amend the compliance schedule. Each Compliance Order encouraged Plaintiffs "to engage in informal discussion of the terms and requirements of this Order upon receipt," and indicated that the Compliance Order could be amended to provide for alternative methods of achieving compliance with the CWA. Each Compliance Order also warned that "failure to comply with, the foregoing Order may subject Respondents to (1) civil penalties of up to $32,500 per day of violation pursuant to section 309(d) of the Act, 33 U.S.C. § 1319(d), and 40

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[1] "A compliance order is a document served on the violator, setting forth the nature of the violation and specifying a time for compliance with the Act." *S. Pines Ass'n v. United States*, 912 F.2d 713, 715 (4th Cir. 1990) (citing 33 U.S.C. § 1319(a)(5)(A)).

C.F.R. Part 19; (2) administrative penalties of up to $11,000 per day for each violation, pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g), and 40 C.F.R. Part 19; or (3) civil action in federal court for injunctive relief, pursuant to Section 309(b) of the Act, 33 U .S.C. § 1319(b)."

On April 28, 2008, Plaintiffs initiated the present action, alleging that the property is not subject to CWA jurisdiction and that the Compliance Order is a violation of Plaintiffs' due process rights. EPA, in turn, moved to dismiss the Plaintiffs' Complaint, contending that the Court lacks subject matter jurisdiction over the Plaintiffs' claims.

Statutory Framework

Congress delegated the authority for enforcement of CWA jointly to both the EPA and the Corps of Engineers, and gave both agencies a range of enforcement tools. Relevant here, the EPA can issue administrative compliance orders or bring civil enforcement actions in federal court. "The violator is subject to the same injunction and penalties whether or not EPA has issued a compliance order." *S. Pines Ass'n v. United States*, 912 F.2d 713, 715-16 (4th Cir. 1990). However, violation of an administrative compliance order will not result in an injunction or penalties until EPA brings an enforcement proceeding in federal district court pursuant to section 309(b) of the CWA, 33 U.S.C. § 1319(b). *Id.* at 717. In any such judicial proceeding, the alleged violator may raise all defenses, including any challenges to the EPA's assertion of jurisdiction over the activity at issue. *Id.*

Discussion

The United States, as a sovereign, may not be sued in federal court without its consent. *United States v. Testan*, 424 U.S. 392, 399 (1976). Where the United States has not consented to suit, the court lacks jurisdiction over the subject matter of the action and dismissal is required. *Hutchinson v. United States*, 677 F.2d 1322, 1327 (9th Cir. 1982). The "party bringing a cause of action against the federal government bears the burden of showing an unequivocal waiver of immunity." *Baker v. United States*, 817 F.2d 560, 562 (9th Cir. 1987).

The Plaintiffs have failed to carry their burden on this issue. Plaintiffs first argue that the Court has subject matter jurisdiction over Plaintiffs' Complaint because Plaintiffs seek declaratory and injunctive relief to prevent an imminent due process injury. According to Plaintiffs "[i]t is well established that the district courts have jurisdiction to entertain such claims." (Pls.' Opp'n at 2 (citing one district court case, from the District of Columbia)).

Plaintiffs' assertion, however, is incorrect. To the contrary, "[i]t is well-settled that 28 U.S.C. § 1331, granting district courts jurisdiction over cases arising under the Constitution, is not a waiver of sovereign immunity." *Humphreys v. United States*, 62 F.3d 667, 673 (5th Cir. 1995). And it is similarly "settled that [the Declaratory Judgment Act,] 28 U.S.C. § 2201, does not itself confer jurisdiction on a federal court where none otherwise exists." *Amalgamated Sugar Co. v. Bergland*, 664 F.2d 818, 822 (10th Cir. 1981). Therefore, the mere fact that Plaintiffs allege a constitutional violation and ask for declaratory and injunctive relief does not satisfy their burden of

establishing an unequivocal waiver of sovereign immunity.

The Plaintiffs next assert that "[j]urisdiction is also proper under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, because the Compliance Order constitutes 'final agency action.'" (Pls.' Opp'n at 1). In support of this theory, Plaintiffs rely upon a Clean Air Act case from the Eleventh Circuit, *Tennessee Valley Authority ("TVA")* v. *Whitman*, 336 F.3d 1236 (11th Cir. 2003), and argue that *TVA* "applies analogously to support Plaintiffs' contention that issuance of CWA compliance orders without affording the regulated party an opportunity to contest the basis of the order is unconstitutional." (Pls.' Opp'n at 4).

There is no need, however, for the Court to resolve the matter before it by applying Eleventh Circuit case law interpreting the Clean Air Act.[2] That is because there are numerous Circuit Court opinions addressing the very same situation presented here, with all of them finding that a district court lacks jurisdiction to review a pre-enforcement compliance order issued under the CWA. In all these opinions, the courts held

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[2] Furthermore, Plaintiffs neglect to mention that in *TVA* the Eleventh Circuit's actual conclusion was that "we lack jurisdiction to review the ACO [administrative compliance order] because it does not constitute 'final' agency action." 226 F.3d at 1239. So that even if the Court believed it appropriate to extend TVA's analysis of the Clean Air Act to the CWA, which it does not, it would result in the very same outcome as here: dismissal of the Plaintiffs' action for lack jurisdiction. *Id.* at 1260 (ruling that "ACOs lack finality . . . [and] we thus conclude that courts of appeals lack jurisdiction to review the validity of ACOs."). Plaintiffs also cite *Alaska Dep't of Envtl. Conservation v. EPA*, 244 F.3d 748, 750 (9th Cir. 2001), which like *TVA* is a Clean Air Act case and therefore is equally inapposite.

that, based on their interpretation of the legislative history and structure of the CWA, Congress intended to preclude judicial review of compliance orders prior to the initiation of a civil action. *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 565-66 (10th Cir.1995) (holding that CWA did not provide for judicial review of EPA compliance order); *Southern Ohio Coal Co. v. Office of Surface Mining*, 20 F.3d 1418, 1426- 27 (6th Cir.1994) (same); *Reuth v. EPA*, 13 F.3d 227, 229-30 (7th Cir. 1993) (holding that challenge to government's right to assert jurisdiction over wetlands in proposed development could not be brought unless government initiates judicial enforcement action); *Southern Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir. 1990) (holding that review of compliance orders issued under CWA were precluded until judicial enforcement action commenced); *Hoffman Group Inc. v. EPA*, 902 F.2d 567 (7th Cir. 1990) (same).

Moreover, it appears that every published district court decision on this same issue, including one issued within the last two months, also has concluded that there is no jurisdiction over a administrative compliance order issued under the CWA. *See, e.g.*, *Acquest Wehrle LLC v. United States*, __ F. Supp. 2d ___, 2008, 2008 WL 2522386 at *7 (W.D. N.Y. June 20, 2008); *see also* Def.'s Mem at 13-14 (listing over ten district court cases). The Court finds these opinions to be well reasoned and consistent with the law. Accordingly, the Court will follow the same in finding that the Court lacks jurisdiction to review the Compliance Order and granting EPA's Motion to Dismiss for lack of subject matter jurisdiction.

ORDER

Based on the foregoing, the Court being fully advised in the premises it is **HEREBY ORDERED** that the United States' Motion to Dismiss Plaintiffs' Complaint for Lack of Subject Matter Jurisdiction (docket no. 14) is **GRANTED**.

IT IS FURTHER ORDERED that this case is **DISMISSED** in its entirety.

DATED: **August 7, 2008**

/s/ Edward J. Lodge
Honorable Edward J. Lodge
U.S. District Judge

Appendix D–1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED Nov. 29, 2010

CHANTELL SACKETT; MICHAEL SACKETT,
Plaintiffs - Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; STEVEN L. JOHNSON, Administrator,
Defendants - Appellees.

No. 08-35854

D.C. No. 2:08-cv-00185-EJL

District of Idaho, Boise

ORDER

Before: BEEZER, GOULD and TALLMAN, Circuit Judges.

The full court has been advised of Appellant's Petition for Rehearing En Banc, and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellant's Petition for Rehearing En Banc is DENIED.

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Attorneys for Plaintiffs

FILED Apr. 28, 2008

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO,
NORTHERN DIVISION

CHANTELL and MICHAEL SACKETT,	)	Case No._____
Plaintiffs,	)	**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**
v.	)	
UNITED STATES ENVIRONMENTAL	)	

PROTECTION AGENCY,)
and STEPHEN L.)
JOHNSON, in his official)
capacity as Administrator of)
the Environmental Protection)
Agency,)
Defendants.)
_____)

* * * *

PARTIES

6. Plaintiffs Chantell and Michael Sackett own the property that is the subject of this action. Plaintiffs own Sackett Construction, a small construction company located at Priest Lake, Idaho. They do work around Priest Lake, and also on projects further south in Coeur D'Alene and Spokane. Plaintiffs purchased the property with the intention to build a house on it. They applied for and obtained the requisite building permits. Nothing in the title documents or title policy indicated any limitation on development.

* * * *

FACTUAL ALLEGATIONS

23. Plaintiffs own a 63-acre dirt lot parcel located at 1604 Kalispell Bay Road, in Bonner County, Idaho. The property is presently undeveloped. The property is bounded to the north by Kalispell Bay Road, to the east and west by undeveloped lots, and to the south by Old Schneider Road.

24. The property lies to the north of Priest Lake. A ditch runs along the north side of Kalispell Bay

Road. Water in that ditch flows westward until discharging in Kalispell Creek, which is approximately 500 feet west of the property. There is no ditch on the south side of Kalispell Road. Between the property and Priest Lake are several developed lots with numerous permanent structures.

* * * *

Appendix F–1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101-3140

Reply to: ETPA-083

May 15, 2008

SENT VIA CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Chantell and Michael Sackett
P.O. Box 425
Nordman, ID 83848-0368

Re: **In *the Matter of Chantell and Michael Sackett* Amended Administrative Compliance Order, EPA Docket No. CWA-10-2008-0014**

Dear Mr. and Mrs. Sackett:

With this letter, the U.S. Environmental Protection Agency (EPA) is issuing an amended administrative compliance order ("Amended Compliance Order") that supersedes and replaces the order issued to you on November 26, 2007. The Amended Compliance Order is issued pursuant Sections 308 and 309(a) of the Clean Water Act, 33 U.S.C. §§ 1318 and 1319(a). EPA is issuing this order in connection with the unauthorized placement of fill material into wetlands at your property located at 1604 Kalispell Bay Road near Kalispell Creek, Bonner County, Idaho ("Site").

It has become apparent that the amended dates for compliance detailed in my letter to you dated May 1, 2008, may not result in successful establishment of revegetated wetland species at the Site because of the short growing season in northern Idaho. Please note that this Amended Compliance Order removes the obligation that wetland vegetation be re-planted at the Site by July 1, 2008. In addition, the Amended Compliance Order extends the date for removal of fill material and replacement of original wetland soils to October 31, 2008 (ahead of the winter season when removal of fill material and replacement of wetland soils would be infeasible). Since replanting will not be required in the 2008 growing season, there is no need to require the immediate removal of fill material. This Amended Compliance Order will account for the ecological constraints in northern Idaho and will also remove the need for immediate judicial resolution of EPA's motion to dismiss the complaint (Case No. CV-08-0185-EJL) you filed on April 28, 2008.

Successful compliance with the Amended Compliance Order does not preclude EPA from bringing a formal enforcement action for penalties or further injunctive relief to address the Clean Water Act violations associated with your property located at the Site. Please also be aware that failure to comply with the Amended Compliance Order may subject you to civil penalties of up to $32,500 per day for each violation, administrative penalties of up to $11,000 per day for each day during which the violation continues or a civil action in Federal court for injunctive relief, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

Should you have any questions concerning this matter, please have your attorney contact Mr. Ankur Tohan directly at 206-553-1796.

Sincerely,

/s/ Richard B. Parkin
Richard Parkin, Acting Director
Office of Ecosystems, Tribal,
and Public Affairs

cc: H. Reed Hopper, Pacific Legal Foundation
Damien Schiff, Pacific Legal Foundation
Leslie Weatherhead, Witherspoon,
Kelley, Davenport & Toole
Greg Taylor, ID Dept. of Water Resources
Beth Rienhart, U.S. Army Corps of Engineers

Appendix G–1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101

In the Matter of:	)	
	)	
CHANTELL AND	)	DOCKET NO.
MICHAEL SACKETT	)	CWA-10-2008-0014
	)	
Bonner County, Idaho	)	**AMENDED**
	)	**COMPLIANCE**
Respondents.	)	**ORDER**
	)	

The following FINDINGS AND CONCLUSIONS are made and ORDER issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by sections 308 and 309(a) of the Clean Water Act ("the Act"), 33 U.S.C. §§ 1318 and 1319(a). This authority has been delegated to the Regional Administrator, Region 10, and has been duly redelegated to the undersigned Director of the Office of Ecosystems, Tribal and Public Affairs. This AMENDED COMPLIANCE ORDER ("Order") supersedes and replaces the Compliance Order issued under Docket Number CWA-10-2008-0014 to Respondents on November 26, 2007.

I. FINDINGS AND CONCLUSIONS

1.1 Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into waters of the United States by any person, except as authorized by a permit issued pursuant to section 402

or 404 of the Act, 33 U.S.C. §§ 1342 or 1344. The unpermitted discharge of any pollutant from a point source constitutes a violation of section 301(a) of the Act, 33 U.S.C. § 1311(a). Section 502(12), 33 U.S.C. § 1362(12), defines the term "discharge of any pollutant" to include "any addition of any pollutant to navigable waters from any point source." "Navigable waters" are defined as "waters of the United States." 33 U.S.C. § 1362(7).

1.2 Respondents Chantell and Michael Sackett (hereinafter collectively "Respondents") are "persons" within the meaning of Sections 301(a) and 502(5) of the Act, 33 U.S.C. §§ 1311(a) and 1362(5).

1.3 Respondents own, possess, or control real property identified as 1604 Kalispell Bay Road near Kalispell Creek, Bonner County, Idaho; and located within Section 12, Township 60 North, Range 5 West, Boise Meridian ("Site"). The Site is adjacent to Priest Lake, and bounded by Kalispell Bay Road on the north and Old Schneider Road on the south.

1.4 The Site contains wetlands within the meaning of 40 C.F.R. § 230.3(t) and 33 C.F.R. § 328.3(b); and the wetlands meet the criteria for jurisdictional wetlands in the 1987 "Federal Manual for Identifying and Delineating Jurisdictional Wetlands."

1.5 The Site's wetlands are adjacent to Priest Lake within the meaning of 40 C.F.R. § 230.3(s)(7) and 33 C.F.R. § 328.3(a)(7). Priest Lake is a "navigable water" within the meaning of section 502(7) of the Act, 33 U.S.C. § 1362(7), and "waters of the United States" within the meaning of 40 C.F.R. § 232.2

1.6 In April and May, 2007, at times more fully known to Respondents, Respondents and/or persons acting on their behalf discharged fill material into wetlands at the Site. Respondents filled approximately one half acre.

1.7 Upon information and belief, Respondents and/or persons acting on their behalf used heavy equipment to place the fill material into the wetlands. The heavy equipment used to fill these waters is a "point source" within the meaning of section 502(14) of the Act, 33 U.S.C. § 1362(14).

1.8 The fill material that Respondents and/or persons acting on their behalf caused to be discharged included, among other things, dirt and rock, each of which constitutes a "pollutant" within the meaning of section 502(6) of the Act, 33 U.S.C. § 1362(6).

1.9 By causing such fill material to enter waters of the United States, Respondents have engaged, and are continuing to engage, in the "discharge of pollutants" from a point source within the meaning of sections 301 and 502(12) of the Act, 33 U.S.C. §§ 1311 and 1362(12).

1.10 Respondents' discharges of dredged and/or fill material was not authorized by any permit issued pursuant to section 402 or 404 of the Act, 33 U.S.C. §§ 1312 or 1314.

1.11 Respondents discharge of pollutants into waters of the Untied States at the Site without a permit constitutes a violation of section 301 of the Act, 33 U.S.C. § 1311.

1.12 As of the effective date of this Order, the fill material referenced in Paragraph 1.6 above remains in place.

1.13 Each day the fill material remains in place without the required permit constitutes an additional day of violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

1.14 Taking into account the seriousness of this violation and Respondents' good faith efforts to comply with applicable requirements, the schedule for compliance contained in the following Order is reasonable and appropriate.

II. ORDER

Based upon the foregoing FINDINGS AND CONCLUSIONS and pursuant to sections 308 and 309(a) of the Clean Water Act, 33 U.S.C. §§ 1318 and 1319(a), it is hereby ORDERED as follows:

2.1 In compliance with the Clean Water Act, Respondents shall remove all unauthorized fill material placed within wetlands located at Section 12, Township 60 North, Range 5 West, Boise Meridian ("Site"). The removed fill material is to be moved to a location approved by the EPA representative identified in Paragraph 2.8. To the maximum extent practicable, the Site shall be restored to its original, pre-disturbance topographic condition with the original wetlands soils that were previously removed from the Site. Acceptable reference topographic conditions exist on wetlands immediately adjacent to and bordering the Site.

2.2 Compliance activities described under Paragraph 2.1 must be completed no later than **October 31, 2008**.

2.3 At least 48 hours prior to commencing compliance activity on the Site, Respondents shall provide verbal notification to the EPA representative identified in Paragraph 2.8.

2.4 Within 7 days of completion of the compliance activities under Paragraph 2.1, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.8. The written notification shall include photographs of Site conditions prior to and following compliance with this Order.

2.5 Upon receipt of the notification referenced under Paragraph 2.4, EPA may schedule an inspection of the Site by EPA or its designated representative.

2.6 Respondents shall provide and/or obtain access to the Site and any off-Site areas to which access is necessary to implement this Order; and shall provide access to all records and documentation related to the conditions at the Site and the restoration activities conducted pursuant to this Order. Such access shall be provided to EPA employees and/or their designated representatives, who shall be permitted to move freely at the site and appropriate off-site areas in order to conduct actions that EPA determines to be necessary.

2.7 EPA encourages Respondents to engage in informal discussion of the terms and requirements of this Order. Such discussions should address any questions Respondents have concerning compliance with this Order. In addition, Respondents are

encouraged to discuss any allegations herein which Respondents believe to be inaccurate or requirements which may not be attainable and the reasons why. Alternative methods to attain the objectives of this Order may be proposed. If acceptable to EPA, such proposals may be incorporated into amendments to this Order at EPA's direction. After compliance with the requirements of this Order, Respondents are also encouraged to contact the EPA representative identified in Paragraph 2.8 to discuss restoration of the Site to its pre-disturbance, vegetative condition.

2.8 All submissions and notifications required by this ORDER shall be sent to:

John Olson
U.S. EPA, Idaho Operations Office
1435 North Orchard Street
Boise, ID 83706
Phone: (208) 378-5756
Fax: (208) 378-5744

2.9 Prior to the completion of the terms of this Order, Respondents shall provide any successor in ownership, control, operation, or any other interest in all or part of the Site, a copy of this Order at least 30 days prior to the transfer of such interest. In addition, Respondents shall simultaneously notify the EPA representative identified in Paragraph 2.8 in writing that the notice required in this Section was given. No real estate transfer or real estate contract shall in any way affect Respondent's obligation to comply fully with the terms of this Order.

2.10 This Order shall become effective on the date it is signed.

III. SANCTIONS

3.1 Notice is hereby given that violation of, or failure to comply with, the foregoing Order may subject Respondents to (1) civil penalties of up to $32,500 per day of violation pursuant to section 309(d) of the Act, 33 U.S.C. § 1319(d), and 40 C.F.R. Part 19; (2) administrative penalties of up to $11,000 per day for each violation, pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g), and 40 C.F.R. Part 19; or (3) civil action in federal court for injunctive relief, pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b).

3.2 Nothing in this Order shall be construed to relieve Respondents of any applicable requirements of federal, state, or local law. EPA reserves the right to take enforcement action as authorized by law for any violation of this Order, and for any future or past violation of any permit issued pursuant to the Act or of any other applicable legal requirements, including, but not limited to, the violations identified in Part I of this Order.

Dated this 15th day of May, 2008

/s/ Richard B. Parkin
RICHARD PARKIN, Acting Director
Office of Ecosystems, Tribal and Public Affairs

Appendix H–1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101-3140

Reply to: ORC-158

May 1, 2008

SENT VIA CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Chantell and Michael Sackett
P.O. Box 425
Nordman, ID 83848-0368

Re: **In *the Matter of Chantell and Michael Sackett***
Administrative Compliance Order,
EPA Docket No. CWA-10-2008-0014

Dear Mr. and Mrs. Sackett:

With this letter, the U.S. Environmental Protection Agency (EPA) is modifying the terms of the administrative compliance order ("Compliance Order") issued to you on November 26, 2007. The Compliance Order requires you to perform specified restoration activities including, but not limited to, removal of unauthorized fill and restoration of the site. Activities under the Compliance Order were modified on April 4, 2008, to account for ground conditions making fill removal and re-planting infeasible. The modified Compliance Order required to fill removal to begin on May 1, 2008, and re-planting to be completed on May 30, 2008. The specific elements for all activates in

the compliance Order are detailed in the Scope of Work for Restoration Work Plan attached to and incorporated into the compliance Order.

EPA has learned that snow cover and low temperatures continue to persist in the Priest Lake area. Consequently, ground conditions remain unfavorable for fill removal and re-planting at this time. Therefore, EPA is extending the deadlines for fill removal and replacement of the wetland soil to June 2, 2008, and for re-planting the site to July 1, 2008. These revisions change Section 2.2 and Section 2.6 of the Compliance Order and Section II.1., Section II.7., and Section VI.1. of the Scope of Work for a Restoration Work Plan. The complete revised schedule is as follows.

Action	Commence-ment No Later Than	Completion No Later Than
Fill shall be removed and wetland soil returned	June 2, 2008	June 15, 2008[1]

[1] At least 48 hours prior to commencing removal activity on the Site, Respondents shall provide verbal notification to the EPA representative identified in Paragraph 2.12 of the Order. Within 7 days of completion of the earthmoving work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 or the Order. The written notification shall include photographs of Site conditions prior to and following earthmoving activities.

Appendix H–3

EPA or its representative conducts an inspection of Site	As soon as possible after notification	Prior to planting
Re-Planting of the entire Site	June 15, 2008	July 1, 2008[2]
Monitoring of the entire Site	October 1, 2008	October 31, 2008
Monitoring of the entire Site	June 1, 2009	June 31, 2009
Monitoring of the entire Site	October 1, 2009	October 31, 2009
Monitoring of the entire Site	October 1, 2010	October 31, 2010

Should you have any questions concerning this matter, please have your attorney contact Mr. Ankur Tohan directly at 206-553-1796.

Thank you for your cooperation.

Sincerely,
/s/ Richard B. Parkin
Richard Parkin
Acting Director,
Office of Ecosystems, Tribal, and Public Affairs

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[2] Within 7 days of completion of re-planting work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 of the Order. The written notification shall include photographs of Site conditions prior to and following re-planting.

cc: John Olson (IOO)
Ankur Tohan (ORC)
H. Reed Hopper
Damien Schiff
Leslie Weatherhead

Appendix I–1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
IDAHO OPERATIONS OFFICE
1435 N. Orchard St.
Boise, Idaho 83706

April 4, 2008

Chantell and Michael Sackett
P.O. Box 425
Nordman, ID 83848-0368

Re: **In *the Matter of Chantell and Michael Sackett***
Administrative Compliance Order,
EPA Docket No. CWA-10-2008-0014

Dear Mr. and Mrs. Sackett:

This is in further regard to the administrative compliance order ("Compliance Order") issued to you by the U.S. Environmental Protection Agency (EPA) dated November 26, 2007. The Compliance Order requires you to perform specified restoration activities including, but not limited to, removal of the unauthorized fill and restoration of the site. The specific elements are detailed in the Scope of Work for a Restoration Work Plan which is attached to and incorporated into the Compliance Order. Deadline for removal of the fill and replacement of the wetland soil is April 15, 2008; deadline for re-planting of the site is April 30, 2008.

EPA is aware that the site is still covered by a substantial amount of snow, thereby making the fill removal and re-planting not feasible at this time. Therefore, EPA is extending the deadline for removal of the fill and replacement of the wetland soil to May 15, 2008 and the deadline for re-planting of the site to May 30, 2008. These revisions change Section 2.2 and Section 2.6 of the Compliance Order and Section II.1., Section II.7., and Section VI.1. of the Scope of Work for a Restoration Work Plan. The complete revised schedule is as follows:

Action	Commencement No Later Than	Completion No Later Than
Fill shall be removed and wetland soil returned	May 1, 2008	May 15, 2008[1]
EPA or its representative conducts an inspection of Site	As soon as possible after notification	Prior to planting

[1] At least 48 hours prior to commencing removal activity on the Site, Respondents shall provide verbal notification to the EPA representative identified in Paragraph 2.12 of the Order. Within 7 days of completion of the earthmoving work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 or the Order. The written notification shall include photographs of Site conditions prior to and following earthmoving activities.

Re-Planting of the entire Site	May 15, 2008	May 30, 2008[2]
Monitoring of the entire Site	October 1, 2008	October 31, 2008
Monitoring of the entire Site	June 1, 2009	June 31, 2009
Monitoring of the entire Site	October 1, 2009	October 31, 2009
Monitoring of the entire Site	October 1, 2010	October 31, 2010

If you should have any technical questions regarding the restoration effort, please feel free to contact me at 208-378-5756. For other questions concerning this matter, please contact Ankur Tohan with the EPA Office of Regional Counsel at 206-553-1796.

Thank you for your cooperation in this matter.

Sincerely,

/s/ John M. Olson
John M. Olson
Wetland Ecologist

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[2] Within 7 days of completion of re-planting work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 of the Order. The written notification shall include photographs of Site conditions prior to and following re-planting.

cc: Ankur Tohan, EPA ORC-158
Barbara Benge, Corps of Engineers, Walla Walla

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OPPOSITION BRIEF

No. 10-1062

In the Supreme Court of the United States

CHANTELL SACKETT AND MICHAEL SACKETT,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the prohibition on pre-enforcement judicial review of administrative compliance orders imposed by the Clean Water Act, 33 U.S.C. 1251 *et seq.*, violates petitioners' rights under the Due Process Clause.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Discussion 7
Conclusion 15

TABLE OF AUTHORITIES

Cases:

Baccarat Fremont Developers, LLC v. *United States Army Corps of Eng'rs*, 425 F.3d 1150 (9th Cir. 2005), cert. denied, 549 U.S. 1206 (2007) 3

Edward J. DeBartolo Corp. v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) 14

Hoffman Group, Inc. v. *EPA*, 902 F.2d 567 (7th Cir. 1990) 6, 8, 9, 11, 13

INS v. *St. Cyr*, 533 U.S. 289 (2001) 14

Laguna Gatuna, Inc. v. *Browner*, 58 F.3d 564 (10th Cir. 1995), cert. denied, 516 U.S. 1071 (1996) 5, 8

Mathews v. *Eldridge*, 424 U.S. 319 (1976) 15

Southern Ohio Coal Co. v. *Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418 (6th Cir.), cert. denied, 513 U.S. 927 (1994) 5, 11

Southern Pines Assocs. v. *United States*, 912 F.2d 713 (4th Cir. 1990) 6, 8, 11

Tennessee Valley Auth. v. *Whitman*, 336 F.3d 1236 (11th Cir. 2003), cert. denied, 541 U.S. 1030 (2004) 11, 12, 13

Cases—Continued: Page

Thunder Basin Coal Co. v. *Reich*, 510 U.S. 200 (1994) 6, 8, 10
United Parcel Serv., Inc. v. *Mitchell*, 451 U.S. 56 (1981) 15
United States v. *Brace*, 41 F.3d 117 (3d Cir. 1994), cert. denied, 515 U.S. 1158 (1995) 9
United States v. *Scruggs*, No. G-06-776, 2009 WL 500608 (S.D. Tex. Feb. 26, 2009) 10
West Va. Highlands Conservancy, Inc. v. *Huffman*, 625 F.3d 159 (4th Cir. 2010) 10

Constitution, statutes and regulations:

U.S. Const. Amend. V, § 1 (Due Process Clause) 5, 7, 8
Administrative Procedure Act:
5 U.S.C. 704 ..... 3, 10
5 U.S.C. 706(2)(A) 5
Clean Water Act, 33 U.S.C. 1251 *et seq.*:
33 U.S.C. 1251(a) 2
33 U.S.C. 1311(a) 2, 4
33 U.S.C. 1319 3
33 U.S.C. 1319(a) 4
33 U.S.C. 1319(a)(3) 3, 4, 9, 13, 14
33 U.S.C. 1319(b) ..... *passim*
33 U.S.C. 1319(c) 3
33 U.S.C. 1319(d) ..... *passim*
33 U.S.C. 1319(g) 3
33 U.S.C. 1342 2
33 U.S.C. 1344(a) 2, 10

Statutes and regulations—Continued: Page

33 U.S.C. 1344(b) 2
33 U.S.C. 1344(c) 2
33 U.S.C. 1344(g)-(h) 2
33 U.S.C. 1344(n) 3
33 U.S.C. 1344(s) 3
33 U.S.C. 1362(6) 2
33 U.S.C. 1362(7) 2
33 U.S.C. 1362(12) 2
18 U.S.C. 3661 14
42 U.S.C. 7413(a)(1) 12
33 C.F.R.:
Pt. 19:
Pts. 320-325 2
Pts. 325-326 3
Pt. 331 3
Section 331.10 10
40 C.F.R.
Pt. 19 4
Section 19.4 9
Pt. 230 2

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v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 622 F.3d 1139. The opinion of the district court (Pet. App. C1-C7) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2010. A petition for rehearing was denied on November 29, 2010 (Pet. App. D1). The petition for a writ of certiorari was filed on February 23, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a). The CWA prohibits the "discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. 1311(a). The term "pollutant" is defined to include, *inter alia*, "dredged spoil," "rock," and "sand." 33 U.S.C. 1362(6). "[D]ischarge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). The Act defines "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

The CWA establishes two complementary permitting schemes. Section 1344 of Title 33 authorizes the Secretary of the Army, acting through the United States Army Corps of Engineers (Corps), or a State with an approved program, to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a) and (g)-(h). Section 1342 authorizes the United States Environmental Protection Agency (EPA), or a State with an approved program, to issue a National Pollutant Discharge Elimination System permit for the discharge of pollutants other than dredged or fill material. See 33 U.S.C. 1342.

The Corps and EPA share responsibility for implementing and enforcing the CWA's permitting provisions. See, *e.g.*, 33 U.S.C. 1344(b) and (c). The two agencies have promulgated regulations governing the Corps' processing and issuance of Section 1344 permits. See 33 C.F.R. Pts. 320-325; 40 C.F.R. Pt. 230. After completing its review of a permit application, the Corps

must determine whether to issue the permit with or without conditions, or to deny the permit. See 33 C.F.R. Pts. 325-326. Subject to the administrative-appeal process, the Corps' issuance or denial of a permit constitutes final agency action that is subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 704. See, *e.g.*, *Baccarat Fremont Developers, LLC* v. *United States Army Corps of Eng'rs*, 425 F.3d 1150, 1153-1154 (9th Cir. 2005), cert. denied, 549 U.S. 1206 (2007); 33 C.F.R. Pt. 331.

Apart from the CWA's permitting provisions, the Act and its implementing regulations provide the Corps and EPA with a number of different mechanisms by which to enforce the Act's prohibition on discharging pollutants into regulated waters. See, *e.g.*, 33 U.S.C. 1319, 1344(n) and (s). As relevant here, when EPA finds "that any person is in violation of section 1311" or other enumerated provisions of the CWA, the agency shall either "issue an [administrative compliance] order requiring such person to comply with such section or requirement," or bring a civil action to enforce the Act. 33 U.S.C. 1319(a)(3). Section 1319(b), in turn, authorizes EPA to initiate a judicial enforcement action for appropriate relief, including a temporary or permanent injunction, "for any violation for which [EPA] is authorized to issue a compliance order" under Section 1319(a)(3). 33 U.S.C. 1319(b). In an action brought under Section 1319(b), the district court may impose civil penalties for violation of the Act and for violation of an administrative compliance order issued pursuant to Section 1319(a)(3).[1] 33 U.S.C. 1319(d).

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[1] Other enforcement mechanisms include criminal prosecutions for negligent or knowing violations of the Act, 33 U.S.C. 1319(c), and administrative penalty orders for violations of the Act, 33 U.S.C. 1319(g).

Administrative compliance orders issued under Section 1319(a)(3) thus are not self-executing. If the recipient of a compliance order fails to obey its requirements, EPA may enforce the order only by filing a civil action under Section 1319(b). In such an action, EPA may seek injunctive relief for violations of the Act, as well as civil penalties for statutory violations and for failure to obey the administrative compliance order. 33 U.S.C. 1319(b) and (d). Before determining the amount of civil penalties, the court must consider several factors, including "the seriousness of the violation or violations," "any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." 33 U.S.C. 1319(d).

2. Petitioners own a .63-acre parcel of undeveloped property in Idaho near Priest Lake. See Pet. App. A2. On November 26, 2007, EPA issued an administrative compliance order to petitioners pursuant to Section 1319(a). See *id.* at A3. The compliance order stated that petitioners had violated 33 U.S.C. 1311(a) by discharging fill material into regulated waters and wetlands without a permit. Pet. App. A3. The compliance order directed petitioners to remove the fill material and restore the wetlands, but it also "encouraged" petitioners to contact EPA and "discuss any allegations herein which [petitioners] believe to be inaccurate or requirements which may not be attainable and the reasons why." *Ibid.*; *id.* at G5-G6. The compliance order stated that failure to comply with the order could expose petitioners to "civil penalties of up to $32,500 per day of violation," as well as administrative penalties. *Id.* at G7 (citing 33 U.S.C. 1319(d), 40 C.F.R. Pt. 19). EPA revised the compliance order on three occasions, extending

the compliance schedule. See *id.* at F1-F3, G1-G7, H1-H4, I1-I4.

Petitioners did not comply with the order. Instead, they requested a formal hearing with EPA, asserting that the wetlands at issue were not regulated by the CWA. Pet. App. A3. EPA did not grant the hearing request. *Ibid.*

3. Petitioners then filed suit in the District Court for the District of Idaho, alleging, *inter alia*, that the compliance order was arbitrary and capricious under the APA, 5 U.S.C. 706(2)(A), and that the order violated their rights under the Due Process Clause because it was issued without a hearing. Pet. App. A3. EPA moved to dismiss the complaint for lack of subject matter jurisdiction. *Ibid.* The district court granted EPA's motion and dismissed the suit. The court held that the CWA's text and structure indicated that Congress intended to preclude pre-enforcement judicial review of CWA compliance orders by channeling review of such orders into enforcement actions initiated by EPA under Section 1319(b). *Id.* at C1-C7.

4. The court of appeals affirmed. Pet. App. A1-A15. The court explained that "[e]very circuit that has confronted this issue has held that the CWA impliedly precludes judicial review of compliance orders until the EPA brings an enforcement action in federal district court."[2] *Id.* at A6 (citing *Laguna Gatuna, Inc.* v. *Browner*, 58 F.3d 564 (10th Cir. 1995), cert. denied, 516 U.S. 1071 (1996); *Southern Ohio Coal Co.* v. *Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418 (6th Cir.), cert. denied, 513 U.S. 927 (1994); and

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[2] Petitioners do not challenge that statutory holding in this Court. See Pet. 8-17.

Hoffman Group, Inc. v. *EPA*, 902 F.2d 567 (7th Cir. 1990); *Southern Pines Assocs.* v. *United States*, 912 F.2d 713 (4th Cir. 1990)). The court stated that it found "[t]he reasoning of these courts * * * persuasive." *Id.* at A7; see *id.* at A7-A9.

The court of appeals further held that the CWA's preclusion of pre-enforcement judicial review of compliance orders does not violate petitioners' due process rights. Pet. App. A10-A15. The court rejected petitioners' argument that the court in a CWA enforcement action may impose penalties for violation of the compliance order regardless of whether petitioners violated the CWA. *Id.* at A10-A12. The court explained that, under the CWA's judicial-enforcement provision, EPA may bring an action "for any violation for which [the EPA] is authorized to issue a compliance order." *Id.* at A12 (quoting 33 U.S.C. 1319(b)). The court construed that provision to mean that, in order "to enforce a compliance order, the EPA must bring an action alleging a violation of the CWA itself." *Ibid.* Accordingly, the court held that "a [district] court cannot assess penalties for violations of a compliance order under [Section] 1319(d) unless the EPA also proves, by a preponderance of the evidence, that the defendants actually violated the CWA in the manner alleged." *Ibid.*

The court of appeals also rejected petitioners' argument that the potential civil penalties to which a compliance order exposes a recipient effectively prevent them from seeking judicial review. Pet. App. A13-A15. Relying on *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 218 (1994), the court explained that statutory preclusion of pre-enforcement judicial review violates due process only when compliance is so onerous, and the penalties for noncompliance so coercive, as to have the practical

effect of foreclosing access to the courts. Pet. App. A13. The court observed that the CWA permitting process enables regulated entities to obtain an agency determination as to the legality of proposed action—and judicial review of that determination—before the party has incurred any costs. *Id.* at A13-A14. The court further explained that, under Section 1319(d), any civil penalties for violating a compliance order would be imposed by the district court only after petitioners have had "a full and fair opportunity to present their case in a judicial forum" and the court had considered several statutory factors in determining the appropriate amount of penalties. *Id.* at A14-A15.

DISCUSSION

Petitioners contend (Pet. 8-18) that the CWA's preclusion of pre-enforcement judicial review of administrative compliance orders violates their rights under the Due Process Clause. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioners contend that "the practical effect" of limiting pre-enforcement judicial review of an administrative compliance order is to foreclose judicial review entirely, because recipients of such orders are faced with an unconstitutional choice between risking coercive penalties by violating the order, and applying for a permit at their own expense. Pet. 9; see Pet. 8-15. That argument lacks merit.

a. As petitioners acknowledge (Pet. 8-9), the courts of appeals that have addressed the issue have uniformly concluded that the CWA provisions governing judicial review of compliance orders do not violate the Due Pro-

cess Clause. See Pet. App. A6-A7 (citing cases); *Laguna Gatuna, Inc.* v. *Browner*, 58 F.3d 564, 565-566 (10th Cir. 1995) (holding that Due Process Clause is not violated when a plaintiff must wait to challenge the basis for a compliance order until EPA pursues an enforcement action), cert. denied, 516 U.S. 1071 (1996); *Southern Pines Assocs.* v. *United States*, 912 F.2d 713, 717 (4th Cir. 1990) (holding that administrative order under the CWA did not raise due process concerns because the recipient was not subject to injunction or penalties until EPA pursued an enforcement action, and the recipient could raise all challenges to the order in that context); cf. *Hoffman Group, Inc.* v. *EPA*, 902 F.2d 567, 569-570 (7th Cir. 1990) (stating that the statutory scheme assures plaintiff a full opportunity to present its arguments, including constitutional objections, before any sanction is imposed). Absent any conflict among the courts of appeals, further review is not warranted.

b. The court of appeals' analysis of the constitutional issue is correct, and it represents a straightforward application of *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994) (*Thunder Basin*). The Court in *Thunder Basin* held that "statutory preclusion of pre-enforcement judicial review of administrative orders violates due process only when the 'practical effect of coercive penalties for noncompliance [is] to foreclose all access to the courts.'" Pet. App. A13 (quoting *Thunder Basin*, 510 U.S. at 218). The court of appeals correctly concluded that "the potential consequences from violating CWA compliance orders are [not] so onerous" as to create a "constitutionally intolerable" choice between complying with the order and risking "coercive penalties." *Id.* at A-13 (citing *Thunder Basin*, 510 U.S. at 218). That is so for two reasons.

First, the CWA provides that no penalties may be imposed prior to judicial review of both the legality of the compliance order and the appropriateness of penalties. Although a compliance order exposes a party to civil penalties of up to $37,500 per day for violations, 33 U.S.C. 1319(d), 40 C.F.R. 19.4, the order is not self-executing. In order to seek civil penalties or to compel a party to comply with the CWA, EPA must file suit under Section 1319(b) and establish to the court's satisfaction that the defendant violated the statute. See *Hoffman Group*, 902 F.2d at 569 (The CWA "assures [a party] of a full opportunity to present its arguments before any sanctions can be imposed."); 33 U.S.C. 1319(a)(3) and (b); Pet. App. A10-A13. Under Section 1319(b), a civil action is authorized only to redress an underlying CWA violation for which EPA "is authorized to issue a compliance order," not for a violation of the compliance order itself. 33 U.S.C. 1319(b). As discussed below, the recipient of a compliance order therefore has a full opportunity to argue in the enforcement action that the order is invalid because the conduct on which it was premised did not violate the CWA. See pp. 13-15, *infra*; see also, *e.g.*, *United States* v. *Brace*, 41 F.3d 117, 124-129 (3d Cir. 1994) (considering compliance-order recipient's challenges to the agency's authority to regulate in the context of an enforcement action), cert. denied, 515 U.S. 1158 (1995).

Even if the court in a Section 1319(b) action finds that a CWA violation has occurred, moreover, the imposition of penalties is "committed to judicial, not agency discretion." Pet. App. A14. In imposing penalties for failing to comply with a compliance order, the court must consider several statutory factors, including the seriousness of the statutory violation, any good-faith

efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and any other relevant equitable considerations. 33 U.S.C. 1319(d); see, *e.g.*, *United States* v. *Scruggs*, No. G-06-776, 2009 WL 500608, at *3-*6 (S.D. Tex. Feb. 26, 2009) (concluding that "a severe penalty is not appropriate" based on analysis of the defendant's ability to pay, the lack of economic benefit from the violation, and the relatively low severity of the violation). These provisions ensure that a party who violates an administrative compliance order will not be subject to penalties prior to the completion of judicial review. See *Thunder Basin*, 510 U.S. at 218 (stating that although statutory civil penalties "may become onerous if petitioner chooses not to comply," there is no "constitutionally intolerable" choice because civil penalties "become final and payable only after full review" by a federal court).

Second, the CWA permits parties to obtain judicial review without exposing themselves to potential penalties by applying for a permit and then seeking review of the permitting decision under the APA. See 33 U.S.C. 1344(a); 5 U.S.C. 704; 33 C.F.R. 331.10; Pet. App. A13-A14. Petitioners could have sought a permit or, after receiving the compliance order, engaged in the informal discussions that EPA's compliance orders invite, Pet. App. G5-G6, which might have obviated the need for judicial review. Although petitioners suggest (Pet. 12-13) that the permitting process is burdensome and may not result in the grant of a permit, they have not established that the procedure is so onerous as to foreclose resort to it. Cf. *West Va. Highlands Conservancy, Inc.* v. *Huffman*, 625 F.3d 159, 169-170 (4th Cir. 2010) (noting that Congress considered the costs of a permitting

system before deciding that "a permitting scheme is the crucial instrument for protecting natural resources").

2. Petitioners further contend (Pet. 15-17) that, in a suit filed by EPA under Section 1319(b), the CWA precludes the defendant from asserting a "jurisdictional defense"—*i.e.*, an argument that the conduct at which the compliance order is directed is beyond the scope of EPA's regulatory authority. Every court of appeals to address the issue has held that the underlying merits of CWA compliance orders, including the question whether the defendant's conduct was regulated by the CWA, are subject to judicial review in enforcement proceedings. See, *e.g.*, *Southern Ohio Coal Co.* v. *Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418, 1426-1427 (6th Cir.) ("Congress provided one forum in which to address all issues, including constitutional challenges, raised by the issuance of a compliance order: an enforcement proceeding"; recipients may bring a "jurisdictional challenge to the agency's issuance of an order" in the context of an enforcement action.), cert. denied, 513 U.S. 927 (1994); *Hoffman*, 902 F.2d at 569-570 (same); *Southern Pines Assocs.*, 912 F.2d at 717 ("[A party] can contest the existence of EPA's jurisdiction if and when EPA seeks to enforce the penalties provided by the Act."). Petitioners argue (Pet. 15-17), however, that the court of appeals' decision, which holds that challenges to EPA's regulatory authority may be asserted in a Section 1319(b) suit, conflicts with the Eleventh Circuit's decision in *Tennessee Valley Auth.* v. *Whitman*, 336 F.3d 1236 (2003) (*TVA*), cert. denied, 541 U.S. 1030 (2004). Petitioners are incorrect.

a. In *TVA*, the Eleventh Circuit considered the provisions of the Clean Air Act (CAA) that govern judicial enforcement of EPA compliance orders. In the Elev-

enth Circuit's view, the "only issue" in a proceeding brought to enforce a CAA compliance order is whether the defendant violated the order itself. 336 F.3d at 1243. The court construed the statute to authorize the imposition of civil penalties based solely on the recipient's violation of a compliance order, regardless of whether the EPA was authorized to issue the order or whether the recipient had actually violated the CAA. *Ibid.*; see *id.* at 1241-1242. The court also observed that EPA's initial decision to issue a compliance order could be based on "any information available," 42 U.S.C. 7413(a)(1), which the Eleventh Circuit interpreted as establishing an evidentiary standard "less rigorous" than probable cause. *TVA*, 336 F.3d at 1241. Having so construed the CAA, the Eleventh Circuit held that the relevant provisions violated the regulated parties' due process rights. *Id.* at 1243, 1258-1260.

The decision below does not squarely conflict with *TVA* because *TVA* involved the CAA rather than the CWA. Although the court below observed that the compliance-order provisions of the two statutes have some common features, Pet. App. A10-A11, the court relied on statutory language unique to the CWA in declining to apply *TVA*'s holding to this case. Specifically, the court emphasized that under Section 1319(b), EPA may "commence a civil action for appropriate relief * * * *for any violation for which [the EPA] is authorized to issue a compliance order.*" *Id.* at A12 (quoting 33 U.S.C. 1319(b)). That language, the court held, demonstrates that "the EPA must bring an action alleging a violation of the CWA itself," and that "a court cannot assess penalties for violations of a compliance order under [Section] 1319(d) unless the EPA also proves * * * that the defendants actually violated the CWA." *Ibid.*

There is consequently no circuit conflict warranting this Court's review.[3]

b. As the court of appeals correctly held, the defendant in an action to enforce a compliance order under the CWA may challenge the merits of the compliance order. The CWA authorizes EPA "to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which [EPA] is authorized to issue a compliance order." 33 U.S.C. 1319(b). Because EPA is authorized to issue a compliance order only if it finds that the recipient has violated the CWA or a permit under the CWA, 33 U.S.C. 1319(a)(3), Section 1319(b) establishes that in order "to enforce a compliance order, the EPA must bring an action alleging a violation of the CWA itself." Pet. App. A12. The CWA does "not authorize the EPA to bring enforcement actions for mere violations of compliance orders." *Ibid.* If the court in a Section 1319(b) suit determines that the recipient of the order has not violated the CWA, or that EPA otherwise lacked authority to issue the order, then it may not impose civil penalties. See *Hoffman Group*, 902 F.2d at 569-570.

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[3] The government disagrees with the Eleventh Circuit's holding with respect to the scope of judicial review that is available under the CAA. In *TVA*, the Solicitor General filed a petition for a writ of certiorari on behalf of EPA, arguing that the court in a suit to enforce a CAA compliance order may inquire into the validity of the order. See 03-1162 Pet. 12-15. This Court denied the petition. 541 U.S. 1030 (2004). The instant case, however, would not be a suitable vehicle for determining the appropriate scope of judicial review under the CAA, in light of the differences between the relevant provisions of that statute and the CWA. And while the Eleventh Circuit in *TVA* observed that the CWA "uses many provisions that are identical to those found in the [CAA]," 336 F.3d at 1255 n.32, the court had no occasion to discuss the language in 33 U.S.C. 1319(b) on which the court below relied.

Petitioners argue (Pet. 16) that because the CWA permits EPA to issue a compliance order on the basis of "any information available," 33 U.S.C. 1319(a)(3), such an order may result in penalties regardless of whether the recipients have violated the CWA. Petitioners are incorrect. EPA's authority to issue a compliance order based on "any information available" simply means that the agency need not apply judicial rules of evidence or follow formal hearing procedures in determining whether there has been a violation of the CWA that warrants issuance of an order.[4] Section 1319(a)(3) does not alter the evidentiary standards that apply when EPA seeks to establish in a judicial enforcement action that the party subject to the order violated the CWA. If the district court concludes that a compliance order is not premised on an underlying violation of the CWA, the statute contemplates that the district court will not enforce the order.

To the extent the CWA is ambiguous on this point, the principle that statutes should be construed if possible to avoid substantial constitutional questions is a sufficient ground for rejecting petitioners' interpretation. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001). The court of appeals therefore correctly construed the CWA to allow the defendant in a Section 1319(b) suit to contest the existence of an underlying CWA violation.[5]

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[4] Cf. 18 U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

[5] Petitioners' amici raise a number of contentions that are not urged by petitioners, were not passed on below, and are not within the ques-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2011

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tion presented. See National Ass'n of Home Builders & Am. Farm Bureau Fed'n Amicus Br. 6-17 (arguing that pre-enforcement judicial review is required under *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976)); Center for Constitutional Jurisprudence & Nat'l Fed'n of Indep. Bus. Small. Bus. Legal Ctr. Amicus Br. 3 (arguing that landowners are burdened by uncertainty about what wetlands are regulated by the CWA); American Civil Rights Union Amicus Br. 3-4, 11-12 (arguing that the compliance order may be an unconstitutional taking of petitioners' property). Review of these arguments is not warranted. See *United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981) (The Court ordinarily does not review a claim interjected by an amicus curiae where the claim "was not raised by either of the parties here or below.").

REPLY BRIEF

RECORDS AND BRIEFS

Supreme Court, U.S.
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CHANTELL SACKETT and MICHAEL SACKETT,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LISA P. JACKSON, Administrator,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do Petitioners have a right to judicial review of an Administrative Compliance Order issued without hearing or any proof of violation under Section 309(a)(3) of the Clean Water Act?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

I. THE AVAILABILITY OF JUDICIAL REVIEW UNDER THE CLEAN WATER ACT IS AN ISSUE OF NATIONWIDE SIGNIFICANCE MERITING THIS COURT'S REVIEW 2

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE ELEVENTH CIRCUIT'S DECISION IN *TVA v. WHITMAN* 4

CONCLUSION 7

TABLE OF AUTHORITIES

Page

Cases

Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) 1

Tennessee Valley Authority v. Whitman, 336 F.3d 1236 (11th Cir. 2003) 1, 3, 5-6

Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) 3

Statutes

33 U.S.C. § 1319(b) 2, 5

§ 1319(d) 3

Regulation

33 C.F.R. § 326.3(e)(1)(ii) 4

INTRODUCTION

Petitioners Chantell and Michael Sackett respectfully submit this Reply to the Opposition Brief of Respondents United States Environmental Protection Agency, *et al.* (EPA). EPA contends that this Court's review is unnecessary because the lower court's decision was correct, and because there is no circuit conflict. But EPA is wrong and nowhere does it rebut the Sacketts' argument that review is merited in this Court because of the nationwide importance of the issue presented. That issue is whether a landowner can obtain judicial review of a unilateral EPA compliance order issued under the Clean Water Act (CWA) only if he invites an enforcement action risking tens, if not hundreds, of thousands of dollars in penalties and criminal sanctions, or endures the prohibitively expensive and potentially fruitless permitting process. EPA's attempts to distinguish *Tennessee Valley Authority (TVA) v. Whitman*, 336 F.3d 1236 (11th Cir. 2003), are unavailing. The Eleventh Circuit's decision squarely conflicts with the Ninth Circuit's decision below. Certiorari should therefore be granted.[1]

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[1] Contrary to EPA's contention, Opp'n at 5 n.2, the Sacketts *do* challenge the Ninth Circuit's holding that the CWA statutorily precludes pre-enforcement judicial review of compliance orders. The Sacketts believe that this Court need not hold the CWA's compliance regime to be unconstitutional to reach the correct result. Rather, the Court can simply hold that the CWA should not be interpreted to preclude judicial review of compliance orders, because such preclusion would be unconstitutional. *Cf. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001) (articulating the "avoidance" canon).

I

THE AVAILABILITY OF JUDICIAL REVIEW UNDER THE CLEAN WATER ACT IS AN ISSUE OF NATIONWIDE SIGNIFICANCE MERITING THIS COURT'S REVIEW

The rule adopted by the Ninth Circuit's decision will have a significant nationwide impact because it has the potential to affect land use on hundreds of millions of acres. *See* Pet. at 9. Also, the rule will have a significant effect because EPA relies regularly on the compliance order regime to administer its environmental agenda without having to submit to the strictures of judicial review. *See* Pet. at 13-14. None of EPA's arguments seeking to minimize the impact of the Ninth Circuit's decision is convincing.

EPA observes that compliance orders are not "self-executing" because EPA must go to court before it can enforce an order against a landowner. *See* Opp'n at 4. EPA is correct that it must go to court before it can enforce a compliance order, but the agency nevertheless admits that compliance orders have the force of law and that a landowner can eventually be held liable for having violated them.[2] *See* Opp'n at 9. Yet ultimately EPA's characterization of compliance orders is irrelevant to the question presented. The due process rights of the Sacketts and other compliance order recipients are violated regardless of how one

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[2] EPA cites 33 U.S.C. § 1319(b) for the proposition that the agency is not authorized to bring a civil enforcement action for violation of a compliance order only. Whatever the merit of EPA's statutory interpretation, the agency does not deny that a landowner could still be liable, in one civil enforcement action, for violations of the CWA itself *and* for a related compliance order.

characterizes the order. Their rights are infringed because judicial review of the order is triggered only by exposing oneself to ruinous fines or by submitting to an onerous and economically senseless permitting process.[3]

EPA tries to play down the significance of these penalties and the costs of the permitting process. The agency notes that penalties for violations of compliance orders can only be assessed after a hearing, and that the ultimate amount of any penalty is left to the discretion of a judge, not the agency. *See* Opp'n at 9-10. Although EPA is correct that a fine cannot be assessed without a judicial proceeding, EPA's observation fails to address the relevant point articulated in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). It is no cure to the due process violation that a fine can only be exacted after a hearing, where the conditions for obtaining the hearing in the first place are constitutionally intolerable. *Cf. id.* at 218.

Further, the force of EPA's point assumes that full judicial review is ultimately available. *TVA* says that the assumption is unwarranted. *See* 336 F.3d at 1256. That holding forms a separate basis for review in this Court. *See* Pet. at 15-17. And, although the ultimate amount of a fine is left to judicial discretion, the "good-faith efforts" of a Clean Water Act violator are only *one* factor that a court may take into account. *See* 33 U.S.C. § 1319(d). That is little assurance to a landowner who is still potentially liable for a very large

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[3] The amicus brief of the Center for Constitutional Jurisprudence ably explains how the CWA's compliance order regime impinges upon constitutionally protected private property rights. *See* Am. Br. of Ctr. for Const. Jurisp. at 5-8.

fine. *See* Pet. at 10 (estimating a year's worth of noncompliance liability at $9 million).

Additionally, EPA relies on the existence of the Clean Water Act permitting regime as an adequate avenue for judicial review. *See* Opp'n at 10-11. But, EPA's reliance is misguided. Generally, a landowner must first resolve a compliance order *before* applying for a permit. *See* 33 C.F.R. § 326.3(e)(1)(ii). The average cost of an individual Clean Water Act permit is in the hundreds of thousands of dollars. *See* Pet. at 13. And the permitting option is economically irrational for many compliance order recipients, because the cost of a permit can significantly exceed the value of the property or project in question.

Therefore, the Ninth Circuit's decision leaves compliance order recipients without a constitutionally adequate means of judicial review. The decision is an issue of nationwide significance meriting this Court's review.

II

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE ELEVENTH CIRCUIT'S DECISION IN *TVA v. WHITMAN*

The Ninth Circuit's decision squarely conflicts with the Eleventh Circuit's decision. *See* Pet. at 15-17. EPA's attempts to explain away this plain conflict are unpersuasive.[4]

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[4] The amicus brief of the American Civil Rights Union ably explains how the Ninth Circuit's and the Eleventh Circuit's decisions are irreconcilable. *See* Am. Br. of Am. Civil Rights Union at 12-14.

EPA argues that *TVA* does not squarely conflict with the decision below because *TVA* dealt with the Clean Air Act (CAA), not the Clean Water Act. The Eleventh Circuit, however, clearly believed that its holding with respect to the Clean Air Act would apply with equal force to the Clean Water Act. *See TVA*, 336 F.3d at 1255 n.32 (noting that the CWA "uses many provisions that are identical to those found in the Clean Air Act" and that "the entire [CWA] subsection is entitled 'compliance orders.'"). EPA argues further that the Eleventh Circuit failed to grasp the importance of language in the Clean Water Act, not present in the Clean Air Act, that allows the two statutory regimes to be distinguished. *See* Opp'n at 12-13 & n.3 (discussing 33 U.S.C. § 1319(b)). But the conflict exists regardless of EPA's post hoc attempts at reconciliation. A court within the Eleventh Circuit would be duty-bound to follow *TVA*'s plain meaning, not EPA's gloss which limits *TVA*'s application to the Clean Air Act. And, more importantly, even the Ninth Circuit below realized that its decision conflicted with *TVA*. *See* Pet. App. A-10 to A-11 (noting that *TVA* "identified constitutional problems with a similar compliance-order provision in the CAA" but nevertheless "declin[ing] to interpret the CWA in this manner").

EPA contends that any due process violation can be avoided by reading the Clean Water Act to allow a compliance order recipient to raise a jurisdictional objection as a complete defense in an enforcement proceeding. *See* Opp'n at 14. But this does not eliminate the constitutional problem, because the cost to obtain judicial review under the Clean Water Act is impermissibly high. Moreover EPA's argument does nothing to remedy the conflict between *TVA* and the

decision below. *TVA* specifically rejected the EPA's argument, accepted by the Ninth Circuit, that the compliance order regime should be read so as to allow the raising of a jurisdictional defense. *See TVA*, 336 F.3d at 1255-56.

EPA also draws support for its view of the case law (and *TVA*'s place in it) from the fact that no other court of appeals has held that the Clean Water Act compliance order regime violates a landowner's due process rights. *See* Opp'n at 7-8. EPA's observation is unhelpful because the cases besides *TVA* have all assumed that a compliance order recipient could ultimately obtain full judicial review (even if the cost of that review were very high).[5] But, as noted in the preceding paragraph, *TVA* rejected jurisdiction as a defense to a compliance order.

The decision below conflicts with that of the Eleventh Circuit in *TVA*. Therefore, review in this Court is merited to resolve that conflict.

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[5] Further, none of the relevant appellate decisions gives serious consideration to the central concern of this Court's decision in *Thunder Basin*: whether the ostensible avenues to judicial review are too onerous to be considered constitutionally adequate. The amicus brief of National Association of Home Builders, *et al.*, ably explains how the lower court misapplied the rule of *Thunder Basin* to the Sacketts' case. *See* Am. Br. of Nat'l Ass'n of Home Builders at 15-17.

CONCLUSION

To address both a conflict between Circuits and an important federal question, the petition for writ of certiorari should be granted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

CHANTELL SACKETT and MICHAEL SACKETT,
Petitioners,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
and LISA P. JACKSON, Administrator.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN CIVIL RIGHTS UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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6

CORPORATE DISCLOSURE STATEMENT

The ACRU is a non-profit, non-stock corporation. Consequently, the ACRU has no parent corporations and no publicly held company owns more than 10% of the corporation's stock.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
I. CERTIORARI SHOULD BE GRANTED BECAUSE THIS CASE PRESENTS IMPORTANT QUESTIONS OF LAW WITH SUBSTANTIAL NATIONAL IMPACT	7
II. CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS A CONFLICT AMONG THE CIRCUIT COURTS THAT SHOULD BE RESOLVED	12
CONCLUSION	14

TABLE OF AUTHORITIES

CASES Page

Board of Regents v. Roth, 408 U.S. 564 (1972) 7

Davidson v. New Orleans, 96 U.S. 97 (1877) 7

Ex Parte Young, 209 U.S. 123, 148 (1908) 10

Fuentes v. Shevin, 407 U.S. 67 (1972) 7

Goldberg v. Kelly, 397 U.S. 254 (1970) 7

Mathews v. Eldridge, 424 U.S. 319 (1976) 7

MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118 (2007) 10

Ochoa v. Hernandez y Morales, 230 U.S. 139 (1913) 7

Rapanos v. United States, 547 U.S. 715 (2006) 9

Tennessee Valley Authority v. Whitman, 363 F. 3d 1236 (11th Cir. 2003) 6, 10, 12, 13

Thunder Basin Coal Co. v. Raich, 510 U.S. 200 (1994) 9, 10

Wilkinson v. Leland, 27 U.S. 627 (1829) 7

STATUTES

Clean Water Act, Section 1319(c)(1)-(2) 9

TABLE OF AUTHORITIES—Continued

Page

REGULATIONS

33 C.F.R. Sect. 326.3(e)(1)(ii) 8

OTHER AUTHORITIES

Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 Envtl. L. 189, 223 (1994) 10

Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: 1985) 12

Christopher M. Wynn, Note, *Facing a Hobson's Choice? The Constitutionality of the EPA's Administrative Compliance Order Enforcement Scheme Under the Clean Air Act*, 62 Wash. & Lee L. Rev. 1879, 1920 (2005) 11

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BRIEF OF THE AMERICAN CIVIL RIGHTS UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct

[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we want to ensure that all constitutional rights are fully protected, not just those that may advance a particular ideology. That includes the rights to property and to Due Process of Law protected by the Fifth Amendment.

SUMMARY OF ARGUMENT

Petitioners Chantell and Michael Sackett purchased a residential lot in a residential neighborhood, zoned and permitted by local authorities for

construction of their home. After they began earthwork prepatory to such construction, they received a Compliance Order from the EPA effectively ruling that moving around dry earth and fill materials on their residential lot to begin their homebuilding project somehow involved discharge of a pollutant into the navigable waters of the United States in violation of the Clean Water Act. The Compliance Order commanded the Sacketts to cease construction of their home, bear the costs of restoring the property to its previous condition, undoing all of their construction activity, and leave the property untouched for a period of years, with no clear opportunity ever to commence building.

The Sacketts were denied any hearing to contest the Compliance Order by the EPA and by the courts below. The Ninth Circuit held that to get a hearing the Sacketts had the choice of bearing the intractable costs of applying for a permit to discharge pollution into the navigable waters of the United States by building their home on a residential lot, as if they were a major industrial enterprise actually engaged in real pollution, and then seek judicial review of any such denial, with no prospect of getting back the intractable costs of any such application. Or they could ignore the Compliance Order, running the risk of bankrupting fines and even criminal liabilities, and then raise their contesting claims in an enforcement action.

This Hobson's choice violates the constitutional requirements of Due Process of Law, which unquestionably protect Petitioners' property interest in building their own home. It involves a regulatory taking as well in violation of the Takings Clause, as the Sacketts are indefinitely denied the use of their

property for the residential purpose for which they purchased it, and any other meaningful use, effectively leaving them required to maintain it as a public park indefinitely. The Sacketts represent one example of potentially thousands of similar constitutional violations across the country. This case consequently presents important questions of law with national impact which we submit should be resolved by this Court.

Moreover, the ruling of the Ninth Circuit below is in direct conflict with an analogous ruling of the Eleventh Circuit. Consequently, we submit the requested Writ of Certiorari should be granted to resolve this conflict.

STATEMENT OF THE CASE

Petitioners Chantell and Michael Sackett purchased a half-acre lot in a built-out area of residential development near Priest Lake, Idaho for the purpose of building their home on the property. Pet. App. A-2, E-2. Local authorities have zoned their lot for residential construction, and provided an existing sewer hookup. Pet. App. E-2.

Obtaining all required building permits from the local authorities, the Sacketts employed contractors who began earthmoving work to prepare the site for home construction. Without any reason to think that such home construction activities on the dry land of their residential property in a residentially developed neighborhood involved the Clean Water Act (CWA) or the Environmental Protection Agency (EPA), Pet. App. E-2, the Sacketts nevertheless received a Compliance Order from the EPA effectively ruling *ex parte* that their home building activities had violated the CWA by illegally dumping fill materials into

jurisdictional wetlands supposedly on their land. Pet. App. G. Somehow, the EPA found that the Sacketts moving earth around on their residential lot in a residential neighborhood involved "the discharge of a pollutant" into the "navigable waters" of the United States.

The Compliance Order required the Sacketts to immediately cease construction of their home, despite building authorization from the local authorities. Indeed, the Compliance Order required them instead to finance costly restoration work, removing all fill material and replanting, followed by a three-year monitoring period during which the Sacketts had to leave their residential land entirely untouched. Pet. App. G-4 – G-6, H-3. In addition, the Compliance Order imposed costly civil penalties on the Sacketts if they failed to comply with the Order's dictates. Pet. App. G-7.

The Sacketts next found that there was nowhere they could challenge the EPA's Compliance Order, at least without incurring costs and delays suited to a major industrial enterprise rather than to a retiring couple trying to build a modest home, or inviting bankrupting fines and even criminal penalties. The Sacketts first sought a hearing before the EPA. But the EPA ignored them. Pet. App. 3. The Sacketts then filed suit in federal court. But the District Court granted the EPA's motion to dismiss the suit. Pet. App. at C-7.

The Sacketts appealed the dismissal to the Ninth Circuit. Despite the general presumption of judicial review of administrative actions, the court held that the CWA precludes judicial review of pre-enforcement actions such as Compliance Orders. Pet. App. 6.

The Sacketts argued that this would mean that the CWA authorizes liability for violations of Compliance Orders, even where the CWA has not been violated. The Eleventh Circuit held in *Tennessee Valley Authority v. Whitman*, 363 F. 3d 1236 (11th Cir. 2003) in regard to an analogous section of the Clean Air Act (CAA) that such Compliance Orders would be unconstitutional if not subject to judicial review. But the Ninth Circuit read into the statute the right to challenge the validity of a Compliance Order if and when the EPA chooses to enforce it, and held that this satisfies constitutional requirements.

The court's ruling leaves the Sacketts then with only this choice. They can seek a permit from the EPA to discharge pollution into the navigable waters of the United States by building their home on a residential lot in a residential neighborhood, as a major industrial enterprise would have to do for real pollution, practically costing more than their property is worth and years of delay in the construction of their own home. Or they can ignore and violate the Compliance Order, incurring overwhelming civil penalties and even quite possibly criminal liability, hoping that a court would use its equitable discretion to set that aside.

The Sacketts request a Writ of Certiorari for this Court to review the Ninth Circuit's ruling as unconstitutional.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THIS CASE PRESENTS IMPORTANT QUESTIONS OF LAW WITH SUBSTANTIAL NATIONAL IMPACT.

This case is about the EPA effectively taking the planned home of Petitioners Chantell and Michael Sackett in a manner reminiscent more of an authoritarian government than a liberal society governed by Due Process and property rights. The Sacketts are not the DuPont Chemical Company able to finance the application for a discharge permit, merely to build their own home on a residential lot in a residential neighborhood. Moreover, such home construction manifestly does not involve discharge of pollution into the navigable waters of the United States, and the Constitution requires that the Sacketts be allowed their day in court to raise that defense without incurring bankrupting EPA civil penalties, and quite possibly criminal liability, which they can only hope a court will equitably set aside.

That Hobson's choice violates the Fifth Amendment's Due Process of Law. The property rights of homeowners are unquestionably protected by Due Process. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Ochoa v. Hernandez y Morales*, 230 U.S. 139 (1913); *Davidson v. New Orleans*, 96 U.S. 97 (1877); *Wilkinson v. Leland*, 27 U.S. 627 (1829). Due process requires a meaningful opportunity to be heard before deprivation of a property interest. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970). As this Court said in *Fuentes*,

> "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of possessions. . . . [T]he prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference."

407 U.S. at 80-81.

The Sacketts have been undeniably denied a property interest. They purchased a residential lot in a residential neighborhood for the purpose of building a home. Now they have been denied the right to build a home on their property, and forced instead to maintain it effectively as a public park, at a minimum for years. But as the EPA has already held that taking steps to prepare for the building of a home on the Sacketts' land somehow involves discharging pollution into the navigable waters of the United States, there is no reason to believe that absent judicial intervention the Sacketts will ever be free to build their home.

At present, the Sacketts have no feasible recourse to get their defenses to an apparently confused EPA ruling even before a court to be heard. Under present EPA regulations, the Sacketts cannot even apply for a permit as the Ninth Circuit suggested. Once a Compliance Order has been issued, EPA regulations provide that "No permit application will be accepted" until the Compliance Order has been resolved. 33 C.F.R. Sect. 326.3(e)(1)(ii). Moreover, even if a permit application would be allowed, that is not remotely a practical, feasible option for the Sacketts. The average application for an individual permit

costs $271,596 and takes 788 days, or more than 2 years. *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion).

In addition, there is no guarantee that after all of those costs and all of that delay, the permit to build their home would be granted, or granted with feasible conditions. If the Sacketts then have to sue after a permit denial to finally get their objections heard by a court, and the court ruled that the Sacketts were right after all, they would have no recourse to get any of those unbearable permit application costs back. As Justice Scalia recognized in *Thunder Basin Coal Co. v. Raich*, 510 U.S. 200, 220-21 (1994)(concurring in part and concurring in the judgment), "[C]omplying with a regulation later held to be invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs."

Alternatively, the Sacketts can ignore the EPA's Compliance Order and seek to raise their defenses when the EPA moves to enforce it. That course entails incurring EPA fines of as much as $750,000 per month, $9,000,000 for a year, for failure to obey the Compliance Order. Moreover, under the federal CWA statute, the Sacketts would have to run the risk of criminal liability as well, as Section 1319(c)(1)-(2) imposes criminal penalties for knowing violations of the Act. Yet, there is no guarantee that in such an enforcement action a right to raise defenses to the Compliance Order would be read into the CWA, as the Ninth Circuit did in this case, especially when the plain language of the statute unambiguously precludes it. Much less is there any assurance that a later court in such an enforcement action would disallow any fine on equitable grounds.

These reasons are exactly why the Eleventh Circuit in *TVA v. Whitman* found such a Hobson's choice imposed by an EPA Compliance Order under a perfectly analogous provision of the CAA to be an unconstitutional violation of the Due Process Clause. The same result is mandated by the opinion of this Court in *Thunder Basin*, where the Court concluded that lack of judicial review is unconstitutional where "the practical effect of coercive penalties for noncompliance is to foreclose all access to the courts," and where "compliance is sufficiently onerous and coercive penalties sufficiently potent." 510 U.S. at 216.

Indeed, over 100 years ago this Court similarly ruled in *Ex Parte Young*, 209 U.S. 123, 148 (1908) that requiring a party to bear "the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts" would be unconstitutional because it would effectively "close up all approaches to the courts." After almost exactly 100 years had passed, this Court again ruled in a similar situation in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) that "Given this genuine threat of enforcement, we did not require, as a prerequisite to testing the validity of the law in a suit for injunction, that the plaintiff bet the farm, so to speak, by taking the violative action."

Commentators have recognized the wisdom in these opinions. Davis writes, "The absence of direct review of compliance orders effectively coerces a recipient to comply with the order prior to EPA enforcement." Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 Envtl. L. 189, 223 (1994). Similarly, Wynn writes that compliance

orders "can coerce a regulated party into a Hobson's choice: Complying with the order may create an enormous financial burden on a company while the company awaits possible EPA enforcement, while ignoring the order may subject the party to severe criminal and civil penalties." Christopher M. Wynn, Note, *Facing a Hobson's Choice? The Constitutionality of the EPA's Administrative Compliance Order Enforcement Scheme Under the Clean Air Act*, 62 Wash. & Lee L. Rev. 1879, 1920 (2005).

The Sacketts do not represent an isolated case of this problem. From 1980 to 2001, the EPA issued 1,500 to 3,000 Compliance Orders each year across the country. Wynn, *supra*, at 1895. So this case presents important questions of law involving potentially thousands of cases of unconstitutional federal activity across this nation denying the most fundamental rights to Due Process of Law. Indeed, it involves a precedent that would affect the enforcement of fundamental Due Process rights in the conduct of administrative agencies across the entire federal government, if not state and local governments as well.

Moreover, besides Due Process issues, this case involves Takings Clause concerns as well. The Sacketts purchased a residential lot in a residential neighborhood for the purpose of building a home. The arbitrary EPA Compliance Order that does not remotely seem to be grounded in any reasonable reading of the law deprives the Sacketts not only of that use of their property, but of any other reasonable use as well, for an indefinite period at least. Consequently, this case presents an ideal test of the regulatory Takings issue, and may involve a violation of the Constitution on these grounds as well. Richard A.

Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: 1985).

In addition, it may represent an example of thousands of similar such constitutional violations across the country. And it would again involve a precedent affecting the enforcement of constitutionally protected property rights in the conduct of all federal administrative agencies, and perhaps state and local administrative agencies as well.

Ultimately, all that Petitioners are asking for in this case is an opportunity for their day in court to present their defenses to an EPA enforcement action which seems on its face to involve an arbitrary misreading of the law. That not only can and should be easily granted, it should easily be recognized as constitutionally required.

Consequently, we respectfully submit that the Writ of Certiorari requested by Petitioners should be granted because this case presents fundamentally important questions of law with national impact.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS A CONFLICT AMONG THE CIRCUIT COURTS THAT SHOULD BE RESOLVED.

There is now a direct conflict over the meaning of the CWA and the CAA between the ruling of the Ninth Circuit below and the ruling of the Eleventh Circuit in *TVA v. Whitman*. While this case dealt with the CWA and *TVA* dealt with the CAA, the relevant language in the statutes and the issues raised are essentially identical.

In *TVA*, the EPA issued a Compliance Order against the Tennessee Valley Authority (TVA) under the Clean Air Act. The Eleventh Circuit recognized that under the statutes Compliance Orders have the force of law independent of the statutes, and impose liabilities for their violation apart from the statute. The language of the CAA consequently provided no basis for the TVA to challenge the Compliance Order and raise its defenses to it. As a result, the Eleventh Circuit recognized that enforcement of the Compliance Order would involve an unconstitutional infringement of the Due Process Clause.

The Ninth Circuit recognized that the same problem arises in the present case in regard to the Sacketts. If the Sacketts want to challenge the Compliance Order rather than comply with it, they would bear penalties for violating it which the language of the statute provides no opportunity to challenge. But the Ninth Circuit argued that the statutory language was not "a model of clarity," and consequently could and should be interpreted to avoid unconstitutionality. It, therefore, read into the statute a right for the Sacketts to raise their defenses to the Compliance Order after the EPA moved for enforcement.

The Eleventh Circuit addressed this statutory interpretation issue by arguing that "no canon of statutory interpretation can trump the unambiguous language of a statute." *TVA*, 336 F. 3d at 1255. Since the statutory language was not ambiguous, the Eleventh Circuit ruled, its meaning could not be stretched to avoid the unconstitutional violation of Due Process of Law.

Consequently, we have a direct conflict over the meaning of the statutory language in the CWA and CAA between the Ninth and Eleventh Circuits. We

can see as well the resulting problem for the Sacketts, for they cannot be certain that ultimately the courts will read a right to raise their defenses into the statute after they violate the Compliance Order, particularly given the inevitability of changing personnel on the courts, including this Court. This uncertainty is a problem, moreover, for all the objects of EPA Compliance Orders under the CWA and CAA, which amounts to thousands of American citizens.

Therefore, we respectfully submit that the Writ of Certiorari requested by Petitioners should be granted to resolve this conflict between the Circuits.

CONCLUSION

For all of the foregoing reasons, *amicus curiae* American Civil Rights Union respectfully submits that this Court should grant the Writ of Certiorari requested by Petitioners.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
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No. 10-1062

In the

Supreme Court of the United States

CHANTELL SACKETT, et vir,

Petitioners.

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Does the Clean Water Act prohibit judicial review of orders issued by the Environmental Protection Agency prohibiting the use of private property, imposing significant costs on property owners, and threatening millions of dollars in civil penalties?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. REVIEW IS NECESSARY TO PRESERVE THE INDIVIDUAL RIGHTS IN PROPERTY RECOGNIZED BY THE DUE PROCESS CLAUSE 4

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Boy Scouts of America v. Dale,
530 U.S. 640 (2000) 1

Elk Grove Unified Sch. Dist. v. Newdow,
542 U.S. 1 (2004) 1

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 1

Jacobellis v. Ohio, 378 U.S. 184 (1964) 5

Mitchell v. W.T. Grant Co.,
416 U.S. 600 (1974) 9

Rapanos v. United States,
547 U.S. 715 (2006) 3-5, 7

Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs,
531 U.S. 159 (2001) 1, 15

TVA v. Whitman,
336 F.3d 1236 (11th Cir. 2003) 6

United States v. Morrison,
529 U.S. 598 (2000) 1

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 6-7, 9

Zelman v. Simmons-Harris,
536 U.S. 639 (2002) 1

United States Constitution

U.S. Const. amend. I 5

U.S. Const. amend. V 9, 14

U.S. Const. amend. XIV 9

State Constitution

N.H. Const. pt. 1, art. 2 13

Federal Statutes

33 U.S.C. § 1311 6

33 U.S.C. § 1319 6

33 U.S.C. § 1362 6

Federal Regulation

40 C.F.R. § 230.3 6

Court Rules

Sup. Ct. R. 37.2(a) 1

Sup. Ct. R. 37.6 1

Miscellaneous

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Blackstone, William, 1 *Commentaries on the Laws of England* (Univ. of Chicago Press 1979) (1765) 10

Editor, BOSTON GAZETTE, Feb. 22, 1768 9

Ely, James W., Jr., *Is Property the Cornerstone of Liberty?*, Lecture at Conference on Property Rights at the Alexander Hamilton Institute for the Study of Western Civilization (Apr. 30, 2009), *available at* http://www.theahi.org/storage/Is%20Property%20the%20Cornerstone%20of%20Liberty-March%2011.doc (last visited Mar. 23, 2011) 9-10, 14

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Hamilton, Alexander, *The Defense of the Funding System*, *in* 19 THE PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett ed., 1973) 13

Joint EPA-Army Corps of Engineers Memorandum, Clean Water Act Jurisdiction following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (Dec. 2, 2008) 5

Lee, Arthur, *An Appeal to the Justice and Interests of the People of Great Britain*, *in* PRESENT DISPUTE WITH AMERICA (4th ed. 1775) 11

Locke, John, *Two Treatises of Government* (Peter Laslett ed., Cambridge Univ. Press 1967) (1690) 10-11

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Webster, Noah, *An Examination into the Leading Principles of the Federal Constitution* (Oct. 10, 1787) 14

Wilson, James, 2 *Collected Works of James Wilson* (Kermit L. Hall & Mark David Hall eds., 2007) 13

IDENTITY AND INTEREST OF AMICI CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is dedicated to upholding the principles of the American Founding, including the individual liberties the Framers sought to protect by adoption of the Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000). The Center is vitally interested in effective judicial oversight of the exercise of power by administrative agencies—especially where that power interferes with the fundamental right to own and use property.

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

The National Federation of Independent Business (NFIB) is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States. The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The NFIB Legal Center frequently files amicus briefs in cases that will affect small businesses.

NFIB's membership includes ranchers, farmers, homebuilders and many others that would be adversely affected if judicial review were delayed until either the landowner has been denied a permit or is subject to an EPA enforcement action. As an organization that represents only the interests of small business owners, NFIB offers a unique perspective on the deleterious effects of the Ninth Circuit's ruling. Under this decision, landowners who have received a compliance order, that they believe is invalid, can get their day in court only by: (1) spending hundreds of thousands of dollars and years applying for a permit that they contend they do not even need, or (2) inviting the agency to bring an enforcement action for potentially hundreds of thousands of dollars in civil penalties for violations of the order, and criminal penalties for underlying violations of the Act. Either choice is financially

untenable for a small business owner and would adversely affect the business's ability to operate or expand.

SUMMARY OF ARGUMENT

In the nearly five years since this Court's fractured ruling in *Rapanos v. United States*, the Environmental Protection Agency and the Army Corps of Engineers have not promulgated a regulation defining the limits of the jurisdiction under the Clean Water Act. Instead, they have settled on a joint "guidance" document that by its terms is not binding on either agency. Property owners are thus left with a regulatory regime that defines "waters of the United States" no more concretely than "I know it when I see it." Against this backdrop, the Ninth Circuit has ruled that EPA is entitled to issue what amounts to a mandatory injunction to property owners without the need to first prove to a court that the property owner has violated the Clean Water Act or even that the property at issue falls within EPA's jurisdiction under the Act. Further, the Ninth Circuit ruled that the property owners' only opportunity for judicial review of the agency-issued injunction is to risk millions of dollars in fines by ignoring the agency order, or spending a quarter of a million dollars and two years of time in pursuit of a permit from the Army Corps of Engineers. Once the Corps has issued a final determination on the permit application then and only then will the property owner be allowed to have his day in court.

This result effectively deprives individuals and small business owners of the rights to own and to use property. Yet the individual rights in property were

among the core individual liberties that the Framers of the Constitution sought to protect. Review by this Court is necessary to ensure that deprivations of individual rights in property remain protected by the Due Process Clause.

ARGUMENT

I. REVIEW IS NECESSARY TO PRESERVE THE INDIVIDUAL RIGHTS IN PROPERTY RECOGNIZED BY THE DUE PROCESS CLAUSE

> The burden of federal regulation on those who would deposit fill material in locations denominated "waters of the United States" is not trivial. In deciding whether to grant or deny a permit, the U.S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot, relying on such factors as "economics," "aesthetics," "recreation," and "in general, the needs and welfare of the people," 33 CFR § 320.4(a) (2004). The average applicant for an individual permit spends 788 days and $271,596 in completing the process.

Rapanos v. United States, 547 U.S. 715, 721 (2006) (plurality opinion).

The process is more burdensome for those who have no intent to fill the "waters of the United States" and indeed have no idea that their property may fall within the definition of "waters."

This Court's decision in *Rapanos* produced five separate opinions on what constitutes the "waters of the United States" for purposes of the Clean Water

Act—none of which commanded a majority of the Court. The Chief Justice noted in his separate concurring opinion that the Court would grant substantial deference to EPA and the Army Corps of Engineers if they exercise their rulemaking power to issue regulations defining the terms at issue in the case. *Id.* at 758. In the nearly five years since the *Rapanos* decision was issued, the agencies have declined to issue such a regulation. Instead, they have chosen to issue a "guidance" which they emphasize is not a "regulation" and does not "impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances." Joint EPA-Army Corps of Engineers Memorandum issued on December 2, 2008, entitled "Clean Water Act Jurisdiction following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*, at 4 n.17.

"Waters of the United States," it would seem, have now reached the status of Justice Stewart's definition of hard core pronography: "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). Justice Stewart and his colleagues were attempting to draw a line of what was protected by the First Amendment and what was not in the context of those who sought to push the boundaries of prior rulings. The Court was struggling to protect the liberties included in the Bill of Rights. Here, however, we are confronted with enforcement officials using their power under the law to compel surrender of private property rights on the basis of an "I know it when I see it" definition. The ambiguity in the definition increases the agency's power at the expense individual liberty. The danger to those fundamental

rights is only heightened by a refusal of the courts to review agency action.

Under the Clean Water Act, a property owner who moves dirt on a portion of his property can be cited for a violation of the Act's prohibition on polluting the "waters of the United States." 33 U.S.C. §§ 1311, 1319, 1362; 40 C.F.R. § 230.3. The Act provides the Administrator with the choice of seeking enforcement of criminal penalties, seeking an injunction, holding an administrative hearing for the purpose of assessing civil penalties, seeking a judicial order for the payment of penalties, or issuing a compliance order. 33 U.S.C. § 1319. According to the court below, only the first four options offer the property owner the opportunity for judicial review of EPA's actions or assertions. As the Ninth Circuit reads the statute, no such review, however, is available for compliance orders.

Compliance orders are not simple orders to "obey the law," but instead operate as mandatory injunctions. *See TVA v. Whitman*, 336 F.3d 1236, 1241 (11th Cir. 2003). In this case, the property owners were ordered to remove the fill dirt placed on the property, replant vegetation, and monitor the property for a period of three years. The compliance order does not state whether the property owners will ever be allowed to use their property for any purpose. For the near term, however, the property owners have been evicted from their own land.

The compliance order requirements displacing the Sacketts from their property distinguishes this case from *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In that case, this Court dismissed the argument that an agency's mere

exercise of jurisdiction over property would constitute a taking. *Id.* at 127. Here, however, we have something more than a mere permit requirement. The property owners have been ordered off of their property.

In answer to the complaint that there has been no judicial review of this order to vacate their own property, the court below ruled that judicial review could be had if only the Sacketts would apply for a permit to fill the wetlands (whether or not the property is in fact wetlands) from the Army Corps of Engineers. Once that permit was denied, the Sacketts could then challenge the denial and thereby obtain judicial review of EPA's claim that the property at issue falls within the statutory definition of "waters of the United States."

The plurality opinion in *Rapanos* noted the difficulties in pursuing such a permit. On average, it takes a little more than two years to obtain a final decision from the agency and costs more than a quarter of a million dollars. *Rapanos*, 547 U.S. at 719. Even without the delay, the cost outstrips the total value of the vast majority of single family home lots.

The Ninth Circuit interpreted the statute as authorizing the agency to issue its own mandatory injunction (thus rendering meaningless the provisions of the statute authorizing the agency to seek an injunction from the United States District Court). A property owner who wants judicial review of that injunction has two options. First, the owner can ignore the order—daring the agency to bring the action to court in an attempt to enforce its injunction with civil penalties that can range up to $32,500 per

day. Then and only then will the property owner have the opportunity to contest the basis of the order—that placing fill-dirt on the property amounted to the addition of a pollutant to the "waters of the United States." The statute provides that mere violation of the compliance order—separate and apart from violation of the Clean Water Act—is grounds for assessment of the daily penalty. Thus, to obtain judicial review of the mandatory injunction a property owner would need to risk ruinous fines of potentially millions of dollars.[2]

The only other option is to submit to the injunction, vacate the property, and seek a permit from the Army Corps of Engineers. At the conclusion of that two-year process, the property owner could seek review of the agency's determination of whether the property constituted "waters of the United States." In this case, however, we deal with individuals who were seeking to build a home on a residential lot in an area where neighboring properties were already developed. This is not the type of a project that can support a permit process that costs a quarter of a million dollars and takes more than two years to complete. Nonetheless, the Ninth Circuit ruled that this was a sufficient opportunity for judicial review to avoid any violation of the Due Process Clause.

We arrive at this situation because of a steady devaluation of the constitutionally protected individual right to own and use property. Although

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[2] If a property chose to ignore the compliance order for the time it took to obtain a final determination from the Army Corps of Engineers on a permit, the potential total fine would exceed $25 million.

specifically mentioned in the Takings Clause of the Fifth Amendment and Due Process Clauses of the Fifth and Fourteenth Amendments, individual rights in property have steadily been eroded to the point that no constitutional violation is seen in regulations that require individuals to obtain "permission" to use their property. *Riverside Bayview*, 474 U.S. at 127. Indeed, a delayed hearing is not seen as a problem for purposes of the Due Process Clause where "*only* property rights are involved." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 (1974) (emphasis added, citation omitted). Those conclusions are only possible if one ignores the original meaning of the protections in the Constitution for the individual right to own and use property.

One of the founding principles of this nation was the view that respect for property is synonymous with personal liberty. In 1768, the editor of the Boston Gazette wrote: "Liberty and Property are not only join'd in common discourse, but are in their own natures so nearly ally'd, that we cannot be said to possess the one without the enjoyment of the other." Editor, BOSTON GAZETTE, Feb. 22, 1768, at 1. This widespread association of liberty and property, particularly fueled by the availability of land, grew from the background and influence of English law and philosophy.

The Magna Carta of 1215 included the first safeguard of rights from infringement by the monarch. James W. Ely, Jr., *Is Property the Cornerstone of Liberty?*, Lecture at Conference on Property Rights at the Alexander Hamilton Institute for the Study of Western Civilization (Apr. 30, 2009), at 1, *available at* http://www.theahi.org/storage/Is%

20Property%20the%20Cornerstone%20of%20Liberty-March%2011.doc (last visited Mar. 23, 2011). Article 39 of the Magna Carta provided, "No freeman shall be . . . disseised . . . except by the lawful judgment of his peers or by the law of the land." Magna Carta, 1215, Article 39, *available at* http://www.constitution.org/eng/magnacar.htm (last visited March 23, 2011). In his 1765 Commentaries on English Law William Blackstone expounded on the application of the Magna Carta and defined private property rights as both sacred and inviolable. It was the "absolute right, inherent in every Englishman . . . which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." William Blackstone, 1 *Commentaries on the Laws of England* 135 (Univ. of Chicago Press 1979) (1765).

In the late seventeenth century, a wave of English political philosophers responded to the Stuart crowns' trespasses by developing theories of property rights. Ely, Lecture, *supra*, at 2. John Locke, the foremost of these influential thinkers, taught that the right to own private property was natural and in fact preceded the state's political authority. Locke's 1690 *Two Treatises of Government* suggested that rights in property were inseparable from liberty in general, and that the only purpose of government was to protect property and all of its aspects and rights. James W. Ely, Jr., *Property Rights: The Guardian of Every Other Right: A Constitutional History of Property Rights* 17 (1997). "The great and chief end therefore, of Men's uniting into Commonwealths, and putting themselves under Government, is the preservation of Property." John Locke, *Two Treatises of Government*

380 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690).

"Lockean" thinking helped to weaken claims of absolute monarchy in England and profoundly influenced 18th century Whigs. Their political and philosophical posture shifted to stress the rights of property owners as the bulwark of freedom from arbitrary government. Ely, *Property Rights*, *supra*, at 17. Property ownership was identified with the preservation of political liberty.

Whig political thought and Blackstone's commentaries were widely studied and shaped public attitudes in colonial America, where property and liberty were inseparable. The Revolution, prompted by England's constant violation of property and commerce, is evidence of the depth of the Founder's commitment to the belief that rights in property could not be separated from political liberty. As Arthur Lee of Virginia declared in his revolutionary 1775 publication, "The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty". Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain*, *in* PRESENT DISPUTE WITH AMERICA 14 (4th ed. 1775).

In 1776, the Declaration of Independence solidified this tie between political liberty and private property. In drafting the Declaration, Thomas Jefferson did not distinguish property from other natural rights, remaining consistent with Whig philosophy and borrowing heavily from John Locke. Ely, *Property Rights*, *supra*, at 17. Locke described the natural rights that government was formed to protect as "life liberty, and estates." Jefferson

substituted "pursuit of happiness" for "estates," but this should not be misunderstood as any de-emphasis of property rights. Instead, the acquisition of property and the pursuit of happiness were so closely transposed that the founding generation found the naming of either one sufficient to invoke both. Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 193 (1980).

"Liberty and Property" became the first motto of the revolutionary movement. Ely, *Property Rights*, *supra*, at 25. The new Americans emphasized the centrality and importance of the right to property in constitutional thought. Protection of property ownership was integral in formation of the constitutional limits on governmental authority. *Id.* at 26. As English policies continued to threaten colonial economic interests, they strengthened the philosophical link between property ownership and the enjoyment of political liberty in American's eyes. Adams, *supra*, at 193.

The widespread availability of land did not alter the view that rights in property could not be overcome by a simple public desire. Instead, it strengthened the view that property was central to the new American social and political order. *Id.* Early State constitutions explicitly reflected this fundamental principle in their language. New Hampshire's 1783 Constitution was one of four to declare that "All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word,

of seeking and obtaining happiness." N.H. Const. pt. 1, art. 2.

Revolutionary dialogue and publications emphasized the interdependence between liberty and property. In 1795, Alexander Hamilton wrote: "Adieu to the security of property adieu to the security of liberty. Nothing is then safe, all our favorite notions of national and constitutional rights vanish." Alexander Hamilton, *The Defense of the Funding System*, *in* 19 THE PAPERS OF ALEXANDER HAMILTON 47 (Harold C. Syrett ed., 1973). When the delegates to the Philadelphia convention gathered in 1787, they echoed this Lockean philosophy. Delegate John Rutledge of South Carolina, for instance, argued that "Property was certainly the principal object of Society." 1 *The Records of the Federal Convention of 1787* 534 (Max Farrand ed., Yale Univ. Press rev. ed. 1937).

The order in which James Wilson listed the natural rights of individuals in his 1790 writing is telling—property came unapologetically first: "I am first to show, that a man has a natural right to his property, to his character, to liberty, and to safety." James Wilson, 2 *Collected Works of James Wilson* ch. 12 (Kermit L. Hall & Mark David Hall eds., 2007). Also in 1790, John Adams proclaimed "Property must be secured, or liberty cannot exist." John Adams, *Discourses on Davila*, *in* 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851).

In the minds of the Founders, property ownership was so closely associated with liberty that property rights were considered indispensible. The language of the Bill of Rights sharply underscores

the Founders' understanding of the close tie between property rights and other personal liberties. It is of great significance that the Fifth Amendment contains key provisions safeguarding property as well as key procedural protections protecting other individual rights. This arrangement shows that the drafters saw no real distinction between individual liberty and property rights. Ely, Lecture, *supra*, at 5.

The founding generation believed that all that which liberty encompassed was described and protected by their property rights. Noah Webster explained in 1787: "Let the people have property and they will have power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of many other privileges." Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* 58-61 (Oct. 10, 1787). From the beginnings of our country, and always in the minds of the Founders, these rights stood or fell together. Ely, Lecture, *supra*, at 5.

These rights and values were enshrined in the Constitution—the Due Process Clause specifically forbids a deprivation of property without "due process of law." As a practical matter, however, the Ninth Circuit has authorized in this case what amounts to a permanent deprivation of property with no opportunity for judicial review. Review by this Court is necessary to preserve the Due Process protections for individual rights in property.

CONCLUSION

EPA is undoubtedly pursuing a program that it believes to be socially beneficial. In that pursuit,

EPA and the Corps have consistently pushed the limits of their authority to regulate private property. *See Solid Waste Agency of N. Cook County*, 531 U.S. at 171-72. The uncertain definition of "waters of the United States" is now coupled with an unreviewable power to issue mandatory injunctions. Congress could not have intended such a result and the constitutional protection of the individual liberties to own and use property cannot tolerate such unreviewable power. Amici urge the Court to grant the petition for writ of certiorari.

DATED: March, 2011.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-1062

In The

Supreme Court of the United States

CHANTELL SACKETT AND MICHAEL SACKETT,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LISA P. JACKSON, Administrator,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

Page(s)

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. THE COURT BELOW IGNORED THIS COURT'S DUE PROCESS PRECENT BY FAILING TO APPLY THE THREE *MATHEWS'* FACTORS 6

A. The EPA Found the Sacketts Guilty of Violating the CWA Without a Hearing 7

B. The Ninth Circuit Failed to Evaluate the Process Actually Available to the Sacketts 10

C. The Ninth Circuit Improperly Relied on *Thunder Basin* 15

II. THE LOWER COURTS HAVE USED DECISIONS PERTAINING TO COMPLIANCE ORDERS TO HOLD THAT OTHER AGENCY ACTIONS ARE NOT REVIEWABLE 17

CONCLUSION 22

APPENDIX

Appendix A ..... App. A1

Sackett, Administrative Compliance Order ..... App. B1

TABLE OF AUTHORITIES

Page(s)

Cases

Armstrong v. Manzo, 380 U.S. 545 (1965) 7

Barry v. Barachi, 443 U.S. 55 (1979) 17

Boddie v. Connecticut, 401 U.S. 371 (1971) 6, 7

Brock v. Roadway Express, Inc., 481 U.S. 252 (1987) 15

Coxco Realty v. U.S. Army Corps of Eng'rs, No. 3:06-CV-416-S, 2008 WL 640946 (W.D. Ky. 2008) 20

Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) 6

Gilbert v. Homar, 520 U.S. 924 (1997) 6-7

Goss v. Lopez, 419 U.S. 565 (1975) 8

Heckler v. Campbell, 461 U.S. 458 (1983) 7

Hoffman Group Inc. v. EPA, 912 F.2d 567 (7th Cir. 1990) 19

Leedom v. Kyne, 358 U.S. 184 (1958) 16

Lotz Realty Co. v. United States, 757 F. Supp. 692(E.D. Va. 1990) 20

Malinski v. People of State of New York, 324 U.S. 401 (1945) 6

Mathews v. Eldrige, 424 U.S. 319 (1976) 7, 14, 17

TABLE OF AUTHORITIES (*cont.*)

Page (s)

National Association of Homebuilders v. Envtl. Prot. Agency, 731 F. Supp. 2d 50 (D.D.C. 2010) 20-21

Rapanos v. United States, 547 U.S. 715 (2006) 10-11, 18

Rueth v. EPA, 13 F.3d 227 (7th Cir.1993) 19

Rueth Development Co. v. EPA, 1992 WL 560944 (N.D. Ind. 1992) 18, 19

S. Pines Assocs. v. United States, 912 F.2d 713 (4th Cir. 1990) 20

Sackett v. EPA, 622 F.3d 1139 (9th Cir. 2010) ..... *passim*

Southern Ohio Coal Co. v. Office of Surface Mining, 20 F.3d 1418 (6th Cir. 1994) 20

The Daniel Ball, 77 U.S. 557 (10 Wall. 557) (1870) 21

Thunder Basin Coal Co. v. Martin, 969 F.2d 970 (10th Cir. 1992) 15, 16, 17

Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) 14, 15

United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940) 21

United States v. Rapanos, 235 F.3d 256 (6th Cir. 2000) 13

TABLE OF AUTHORITIES (*cont.*)

Page (s)

Statutes and Regulations

U.S. Const. Amend. V 6
U.S. Const. Amend. XIV 6
5 U.S.C. § 704 10
30 U.S.C. § 801 15
33 U.S.C. § 401 19
30 U.S.C. § 815(a) 16
30 U.S.C. § 823(d) 16
33 U.S.C. § 1319(d) 14
33 U.S.C. § 1344 18
33 U.S.C. § 1362(7) 18
30 C.F.R. § 40.4 15
33 C.F.R. § 326.3(e)(1) 10
33 C.F.R. § 326.3(e)(1)(i) 10
33 C.F.R. § 326.3(e)(1)(v) 11
33 C.F.R. § 329.4 21
33 C.F.R. §§ 331.1-.12, App. A-B 11
33 C.F.R. § 331.10 ..... 10, 12, 13
33 C.F.R. § 331.11 ..... 11, 12
33 C.F.R. § 331.12 ..... 12, 13
40 C.F.R. § 19.4 14

TABLE OF AUTHORITIES (*cont.*)

Page (s)

Other

EPA/Corps, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (originally issued June 5, 2007; revised Dec. 2, 2008), http://www.epa.gov//owow/wetlands/pdf/RapanosGuidance6507.pdf 18

Office of Management and Budget, Nick Juliano, *EPA Readies Guidance Aimed at Expanding Clean Water Jurisdiction* (Jan. 11, 2011), http://insideepa.com 18

Petition for Writ of Certiorari, *Chantell Sackett, et vir v. EPA, et al.*, No. 10-1062 (Feb. 23, 2011) 9, 19

Petition for Writ of Certiorari Appendix G, *Chantell Sackett, et vir v. EPA, et al.*, No. 10-1062 (Feb. 23, 2011) 8

INTEREST OF *AMICI CURIAE*

The National Association of Home Builders (NAHB) and the American Farm Bureau Federation (AFBF) have received the parties' written consent to file this *amici curiae* brief in support of Petitioner.[1]

NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's more than 160,000 members are home builders or remodelers, and its builder members construct about 80 percent of the new homes each year in the United States.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and interests of its members. NAHB was a petitioner in another Clean Water Act (CWA) case, *NAHB v. Defenders of Wildlife*, 551 U.S. 644 (2007). It also has participated before this

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[1] Under Rule 37.6 of the Rules of this Court, *Amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amici*, their members, or their counsel contributed monetarily to the preparation and submission of this brief. Counsel of record for all parties received timely notice of *Amici's* intent to file this brief under Rule 37.2(a), and letters of consent to file this brief are on file with the Clerk of the Court under Rule 37.3.

Court as *amicus curiae* or "of counsel" in a number of cases involving landowners aggrieved by excessive regulation under a wide array of statutes and regulatory programs. *See* Appendix A.

Amicus AFBF is a voluntary general farm organization formed in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers. The AFBF represents more than 6.2 million member families through member organizations in all fifty states and Puerto Rico.

Most of the AFBF member families own and operate farmlands that produce the row crops, livestock, and poultry that provide safe and affordable food, fiber and fuel for Americans and a growing global population. The reach and expansion of federal jurisdiction over farmland and the lack of due process to contest regulatory decisions is one of the most serious problems facing farmers and ranchers today.

Amici's organizational policies have long advocated that the federal courts must be available for all landowners to adjudicate their rights and duties arising under federal law. The court of appeals' decision undermines this objective. As a result of the fragmented opinion in *Rapanos v. United States,* landowners must determine the extent of CWA jurisdiction by "feel[ing] their way on a case-by-case basis." 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring). In this case, the U.S. Environmental Protection Agency (EPA or the Agency) determined that it had authority over the Petitioners' private property, Petitioners' actions violated federal law, and that Petitioners' must dedicate significant time and resources to implement the EPA's orders – all without any type of

hearing and at the risk of significant civil and criminal penalties.

The Court should grant certiorari to confirm that the Fifth Amendment's guarantee of Due Process is violated when an agency deprives landowners of their property rights without a hearing. Correcting this blatant deprivation of due process would restore some balance to the lop-sided and unjust system by which the Executive Branch subjects private property to CWA jurisdiction.

SUMMARY OF ARGUMENT

The Petitioners' received a letter and Compliance Order from the EPA that makes clear the Agency had determined:

> i) what activities occurred on the Petitioners' private property;
> ii) that they were guilty of violating federal law; and
> iii) that the Petitioners must complete all of the specific actions established in the Order by specified deadlines.

In response, the Petitioners requested a hearing, which the EPA ignored. Pet. for Writ of Cert. at 6.

The Court of Appeals held that the EPA's procedures did not violate the Due Process Clause.[2] In doing so, the court completely ignored the three factors used to determine whether a person has been deprived of life, liberty, or property without due process:

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.

Mathews v. Eldrige, 424 U.S. 319, 335 (1976).

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[2] U.S. Const. amend. V.

This Court should grant certiorari and determine whether the Petitioners were provided a constitutionally sufficient process under *Mathews v. Eldrige*.

ARGUMENT

I. THE COURT BELOW IGNORED THIS COURT'S DUE PROCESS PRECEDENT BY FAILING TO APPLY THE THREE *MATHEWS'* FACTORS.

Generally, to satisfy the Due Process Clause[3] no hearing at the preliminary stage of an administrative proceeding is required, "so long as the requisite hearing is held before the final administrative order becomes final." *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598 (1950); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (providing that "an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.") (emphasis added). The required hearing, however, is "not fixed in form." *Boddie*, 401 U.S. at 379. It may be postponed until after the government deprives a person of his rights, but only in "extraordinary situations where some valid government interest is at stake that justifies" the postponement. *Boddie*, 401 U.S. at 379; *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) ("[W]here a State must act quickly, or where it would be impractical to provide

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[3] In this instance the Fifth Amendment Due Process Clause is implicated because the federal government deprived the Sacketts of "life, liberty, or property." U.S. Const. amend. V. *Amici* rely on both Fifth and Fourteenth Amendment due process cases, as the Court has never found that "due process of law" means something different in the two Amendments. *Malinski v. People of State of New York*, 324 U.S. 401, 415 (1945) (J. Frankfuter concurring) ("To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.").

predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause."). The required hearing "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). And it is "the decisionmaker's obligation to inform himself about facts relevant to his decision and to learn the claimant's own version of those facts." *Heckler v. Campbell*, 461 U.S. 458, 471 n.1 (1983) (J. Brennan concurring).

To determine what process is constitutionally due, this Court has "generally balanced three distinct factors," *Gilbert*, 520 U.S. at 931:

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.

Mathews v. Eldrige, 424 U.S. 319, 335 (1976). The court below failed to follow this Court's established due process analysis, instead relying on a case that is factually distinguishable from the case at bar.

A. The EPA Found the Sacketts Guilty of Violating the CWA Without a Hearing.

On November 26, 2007, the EPA sent the Sacketts a letter and Compliance Order (Order) that "require[d] [them] to perform specified restoration activities" to their private property. App. B2. In addition, the EPA commanded that the Sacketts "provide certain specified information" to the

Agency. *Id.* This was the first notification received by the Sacketts alleging that they were not in compliance with federal law.[4] The Order was final and left no room for interpretation – the Sacketts had no choice but to follow the government's instructions.

First, there was no suggestion that the Agency would entertain any challenges to the Order. The closing paragraph of EPA's letter provides that the Sacketts could ask "questions" of two EPA employees, but offered the Sacketts no opportunity to "present [their] side of the story." App. B2; *Goss v. Lopez*, 419 U.S. 565, 581-82 (1975) (explaining that students who are suspended for 10 days or less must be provided an opportunity to explain their version of the facts).

Furthermore, the language used in the Order unmistakably required the Sacketts to obey the Agency. The Order begins with EPA's "FINDINGS AND CONCLUSIONS." App. B5. This is not simply EPA's "FINDINGS," which may offer the recipient an opportunity to provide information that could affect the Agency's final "conclusion." Instead, "FINDINGS AND CONCLUSIONS" means that the Agency had reached a final determination, and the recipient had no opportunity to provide information to influence the outcome. Similarly, in the next section, "ORDER," the EPA used the word "shall" eighteen times when referring to actions that it believed the Sacketts needed to complete. App.

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[4] Subsequently, the EPA sent various modifications and amendments to the Order. The latest "Amended Compliance Order" was dated May 15, 2008 – after the Sacketts filed their suit in district court. Pet. for Writ of Cert. App. G-1-G-7.

B6, paras. 2.1-2.14. Additionally, the EPA required many of those actions be completed by specific dates.[5] The last section of the Order provided an in-depth, authoritative "SCOPE OF WORK," requiring the Sacketts to, among other things: (1) install a fence around the site for "three growing seasons;" (2) revegetate the site using only certain plant species; (3) purchase plant seed from specified vendors; and (4) grant the government access to their property. App. B13 – B17.

Thus, the EPA's letter and Order offered no opportunity for the Sacketts to discuss the situation with the EPA. The Agency had already decided:

i) what took place on the Sacketts' property;
ii) that the Sacketts were guilty of violating federal law; and
iii) that the Sacketts must complete all of the specific actions established in the Order by specified deadlines.

All of this occurred with no input from the Sacketts. In response, the Sacketts, as encouraged by the EPA,[6] requested a hearing to provide information relevant to the EPA's authority over their property. The Agency ignored that request. Pet. for Writ of Cert. at 6.

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[5] For example, fill had to be removed "no later than April 15, 2008," and the Sacketts had to "re-plant[ ] the Site by April 20, 2008." App. B6, paras. 2.2, 2.6.

[6] App. B8, para. 2.11.

B. The Ninth Circuit Failed to Evaluate the Process Actually Available to the Sacketts.

According to the Ninth Circuit, in response to a compliance order, a landowner has two avenues to obtain a (delayed) hearing: (1) she can apply for a permit and later challenge the agency's decision denying the permit application; or (2) she is afforded a district court hearing after the government seeks civil or criminal penalties in an enforcement action. *Sackett v. U.S. E.P.A.*, 622 F.3d 1139, 1146-47 (9th Cir. 2010). But access to a hearing under either avenue is conjectural, indirect, and ultimately controlled by the agency that has possibly overstepped its authority. This Court should determine if the Due Process Clause demands more.

The Ninth Circuit explained that, under the first "avenue," a landowner may seek judicial review after the agency denies a section 404 permit application. *Sackett*, 622 F.3d at 1146 (citing 33 C.F.R. § 331.10; 5 U.S.C. § 704). However, the landowner receives her day in court only *if* she succumbs to possible agency overreach by spending time and money to implement the order's commands;[7] *if* she spends an average of 788 days and

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[7] Where the U.S. Army Corps of Engineers (Corps) has determined that a landowner filled wetlands without authorization, she must apply for an "after-the-fact" permit. 33 C.F.R. § 326.3(e)(1). But the Corps – "exercis[ing] the discretion of an enlightened despot" – will not process the application until the district engineer is satisfied that the landowner has fully restored the wetlands and eliminated any current or future detrimental impacts. *Id.* at § 326.3(e)(1)(i); *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality). The

$271,596 (excluding mitigation costs and design changes) to complete the section 404 permit application process;[8] *if* the agency denies the permit application;[9] and *if* she

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landowner must also agree to toll the statute of limitations. 33 C.F.R. § 326.3(e)(1)(v).

[8] This Court noted that "[t]he average applicant for an individual permit spends 788 days and $271,596," excluding mitigation costs and design changes. *Rapanos*, 547 U.S. at 721 (citing Sunding & Zilberman, 42 NAT. RESOURCES J. 59, 74-76 (2002) (discussing the results of a 1999 survey)). Private and public entities spend an estimated $1.7 billion each year to obtain wetlands permits. *Id.*

[9] Alternatively, if the Corps issues the permit, the landowner may either challenge permit conditions or decline the permit. If no compliance order has been issued, the landowner submits objections to the district engineer, and then appeals to the division engineer if she receives an unfavorable decision. If the appeal is accepted, the reviewing officer examines the record, confers with the parties, and issues a decision. After exhausting administrative remedies, the landowner may appeal the permitting decision to a federal court. 33 C.F.R. §§ 331.1-.12, App. A-B.

This appeal process is further complicated when the landowner must apply for an "after-the-fact" permit. 33 C.F.R. § 331.11. If the district engineer determines that corrective measures have not been "completed to [his] satisfaction," the Corps will not accept the application or a later appeal. *Id.* It is also unclear if the terms of the compliance order are "relevant" to the issues in the appeal process or that they may be raised in district court if they

exhausts all administrative remedies.[10] Only ***then*** the landowner is afforded a hearing to challenge the agency's decision denying the permit that she believes was not required. *See Sackett*, 622 F.3d at 1146. The Ninth Circuit assumes that the landowner may then challenge both the permit decision and the compliance order.

But, even if the landowner successfully challenges the agency's permitting decision (or proves that it had no authority to issue the order), she has forfeited the substantial cost and time to comply with the order, complete the permit application process, wait for a decision on the permit, and litigate the agency's unlawful exercise of authority – delaying the profitable and preferred use of her property.

More importantly, the Ninth Circuit overlooked that this "avenue" to judicial review is likely unavailable to landowners in the Sacketts' position. When the EPA has taken the lead in enforcement and issued a compliance order, the landowner may not access the Corps's administrative appeal process for permitting decisions. 33 C.F.R. § 331.11 (the administrative appeal process is unavailable "if the unauthorized activity is the subject of a referral to the Department of Justice or the EPA, or for which the EPA has the lead enforcement authority or has

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have been deemed irrelevant in the administrative appeal process.

[10] The Ninth Circuit incorrectly notes that a permit denial is "immediately appealable to a district court under the APA." *Sackett*, 622 F.3d at 1146. Corps regulations require the landowner to exhaust all administrative remedies. 33 C.F.R. §§ 331.10, 331.12.

requested lead enforcement authority."). Thus, the Sacketts had to wait for the government to file an enforcement action, and therefore, in reality, had only one way to access judicial review under the Ninth Circuit's framework.

Under the second "avenue," the landowner can seek judicial review of civil or criminal penalties after the government files an enforcement action. *Sackett*, 622 F.3d at 1146-47. However, under this avenue, the landowner receives her day in court only ***if*** the agency refers the matter to the Department of Justice (DOJ) for civil or criminal enforcement;[11] ***if*** the DOJ files a civil or criminal complaint in federal court; and ***then*** she can present her version of the facts and law in a federal district court. Of course, if she has ignored the compliance order, then she has risked prison time and hundreds of thousands of dollars in civil and criminal fines.[12] Conversely, if she obtains judicial review having complied with the order, then she may have spent hundreds of thousands of dollars and altered her property to learn that the Agency never had jurisdiction.

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[11] Alternatively, the agency could choose to impose administrative penalties, in which case the landowner also must exhaust administrative remedies before judicial review is available. 33 C.F.R. §§ 331.10, 331.12.

[12] In the *Rapanos* litigation, for example, Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines for filling wetlands on his property without a permit. *United States v. Rapanos*, 235 F.3d 256, 260 (6th Cir. 2000).

Thus, as a result of the Order, the Sacketts could have: (i) ignored[13] or complied[14] with the Order, and waited for the government to bring an enforcement action; or (ii) expended time and resources complying with the Order and submitted to the government's jurisdiction by filing a CWA permit application.

> Based on the impact of these procedures on the Sacketts, the court below should have applied the three *Mathews* factors and determined whether the process satisfied the Due Process Clause. Instead, the Ninth Circuit incorrectly relied on *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) (hereinafter *Thunder Basin*) to find that a landowner may be deprived of a property right without any type of hearing.

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[13] Any person who violates the CWA is potentially subject to penalties of $37,500 per day. 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4. The Ninth Circuit noted that civil penalties are "committed to judicial, not agency, discretion." *Sackett*, 622 F.3d at 1146. But the court ignored that, under the civil penalty provision, the landowner risks more ruinous penalties by ignoring the compliance order and waiting for her day in court. 33 U.S.C. § 1319(d) (allowing an upward penalty adjustment for the "economic benefit" of delayed compliance and reflecting "good-faith efforts to comply").

[14] As illustrated by the SCOPE OF WORK, compliance with an order will obviously cost a property owner time and money. App. B11 – B17.

C. The Ninth Circuit Improperly Relied on *Thunder Basin*.

Due process analysis requires a court to closely review the process provided by the government because the procedures that are constitutionally required "vary according to the interests at stake." *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 261 (1987). Instead of reviewing the process afforded the Sacketts, the court below improperly relied on *Thunder Basin* to find that the EPA had satisfied the Due Process Clause. *Sackett*, 622 F.3d at 1146.

In *Thunder Basin*, a mine operator brought suit in district court claiming that the "statutory-review provisions [of the Mine Act] violate[d] due process by depriving [it] of meaningful review." *Thunder Basin*, 510 U.S. at 214 (evaluating the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 801, *et seq.*). The Mine Act requires mine operators to post information pertaining to "representatives" chosen by its miners. 30 C.F.R. § 40.4. Objecting to the chosen representatives, the operator refused to post the information and complained to the Mine Safety and Health Administration (MSHA). Rather than follow the "usual procedure," the mine operator preemptively sued MSHA in district court to dispute "an anticipated citation and penalty." *Thunder Basin*, 510 U.S. at 206 (citing the Tenth Circuit's decision in *Thunder Basin Coal Co. v. Martin*, 969 F.2d 970, 975 (10th Cir 1992)). Thus, the operator sought judicial review even before the MSHA district manager sent a letter instructing the operator to post the information. *Id.* at 205.

Under the "usual procedure," operators who refuse to comply with the Mine Act would "receive[] a citation, then an order, and a proposed assessment of penalty. A citation, order, or proposed assessment [could] be contested before an administrative law judge (ALJ), and thereafter appealed to the Federal Mine Safety and Health Review Commission . . . ." *Thunder Basin*, 969 F.2d at 973 (internal citations omitted). After exhausting these administrative remedies, the operator could appeal "to a United States court of appeals . . . ." *Id.*

The Ninth Circuit failed to recognize the distinguishing facts between *Thunder Basin* and the Sacketts' case. First, the mine operator in *Thunder Basin* sought judicial review before it received any type of order; thus making it a case concerning "anticipated" government action. *Thunder Basin*, 969 F.2d at 975. In contrast, the Sacketts received an Order commanding that they alter their private property; thus, their case concerns a deprivation of property rights without a hearing "in excess of [the agency's] delegated powers." *Leedom v. Kyne*, 358 U.S. 184, 188 (1958).

Second, the procedure at issue in *Thunder Basin* is quite different from the process a property owner is afforded under the CWA. Under the Mine Act, a mine operator may challenge an order within 30 days of receipt, and receive a hearing before an independent ALJ. 30 U.S.C. § 815(a). The ALJ decision can then be appealed to the Commission for discretionary review. 30 U.S.C. § 823(d). In contrast, the CWA requires a property owner who receives an order to either: (i) wait for the government to file an enforcement action; or (ii) comply with the order, submit a permit application, wait for the government to accept, process, and issue a decision on the application

(all on its own timeframe), and then seek judicial review. *See* Part I.B., *supra* at 10. Consequently, the CWA does not provide a compliance order recipient with a right to a hearing, and there is no set timeframe in which she can present her version of the facts. *See, e.g., Barry v. Barachi*, 443 U.S. 55, 66 (1979) (providing that a horse trainer must be provided a "prompt postsuspension hearing, one that would proceed and be concluded without appreciable delay."). The Ninth Circuit erred by relying on *Thunder Basin* and ignoring the differences between the process afforded mine operators under the Mine Act and property owners under the CWA.

* * *

Thus, a recipient of an order under the CWA must either wait for the government to act, or comply with the order before he or she can "present their side of the story." NAHB, therefore, respectfully requests the Court review this matter under the *Mathews* test and determine whether the procedure established under the CWA satisfies the requirements of the Due Process Clause.

II. THE LOWER COURTS HAVE USED DECISIONS PERTAINING TO COMPLIANCE ORDERS TO HOLD THAT OTHER AGENCY ACTIONS ARE NOT REVIEWABLE.

By ruling that the CWA precludes judicial review of compliance orders, the Ninth Circuit and other courts have impacted the rights of landowners interested in challenging the validity of other agency actions. Relying on court decisions barring judicial review of compliance orders, several courts have held that other agency decisions are also unreviewable. The impact of this rule is compounded by widespread confusion among judges, the

regulated community, and government agencies concerning what constitutes jurisdictional "waters of the United States"[15] 33 U.S.C. § 1362(7).

In a case factually similar to *Sackett*, *Rueth Development Co. v. EPA*, 1992 WL 560944 (N.D. Ind. 1992) (hereinafter *Rueth I*), involved a landowner had allegedly discharged unpermitted fill material into isolated wetlands on its property. By compliance order, the EPA ordered Rueth to cease its discharge activities and to undertake action to restore the filled wetlands. *Id.* at *1. Instead of challenging the order, the landowner filed suit, challenging EPA's underlying "jurisdictional determination"[16] that the isolated wetlands were "waters

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[15] Since the Supreme Court's decision in *Rapanos*, the EPA and Corps have issued two guidance documents to clarify the meaning of "waters of the United States." EPA/Corps, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (originally issued June 5, 2007; rev. Dec. 2, 2008), http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf. The agencies recently drafted yet another guidance document, which is under review at the Office of Management and Budget. Nick Juliano, *EPA Readies Guidance Aimed at Expanding Clean Water Jurisdiction* (Jan. 11, 2011) (subscription required), *available at* http://insideepa.com (last visited Mar. 22, 2011).

[16] A jurisdictional determination is a written Corps decision that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. § 1344) or a written decision that a waterbody is subject to regulatory jurisdiction under

of the United States." *Id.* The district court dismissed the case for lack of subject matter jurisdiction based on *Hoffman Group Inc. v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990), which held that compliance orders are not judicially reviewable. The court reasoned that "[i]f agency compliance orders are not reviewable until the enforcement stage, then it follows that an agency's initial determination that it has authority to either require permitting or issue compliance orders in the absence of a permit application must also be unreviewable." *Rueth I*, 1992 WL 560944 at *2.

On appeal, the Seventh Circuit affirmed the lower court's decision with two reservations. *Rueth v. EPA*, 13 F.3d 227 (7th Cir. 1993) (*Rueth II*). First, the circuit court acknowledged that *Rueth I* leaves landowners "in limbo" during the period between the issuance of a compliance order and the filing of a judicial or administrative enforcement action. *Rueth II*, 13 F.3d at 230. The court also recognized that this "predicament" may have significant economic and legal consequences for the landowner, but reasoned that an "experienced developer" such as Rueth should anticipate the potential presence of regulable wetlands and plan accordingly.[17] *Id.* at 230-31. In addition, the court conceded that there is a real

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Sections 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 401, *et seq.*).

[17] Although not an "experienced developer" with institutional expertise and knowledge, the Sacketts, prior to purchase of their property, conducted a full due-diligence search that revealed no wetlands permitting issues or requirements for the property. Pet. for Writ of Cert. at 4 - 5.

possibility that the EPA or the Corps might "completely overextend their authority" over potentially regulable wetlands. *Id.* at 231. In such instances the circuit court forewarned agencies that it would not hesitate to intervene. *Id.*

Similarly, in *Lotz Realty Co. v. United States*, 757 F. Supp. 692, 694 (E.D. Va. 1990), a developer sought judicial review of a Corps jurisdictional determination that wetlands were present on its property and that an individual permit was necessary for the proposed development. Thus, *Lotz* also involved a challenge to an agency decision that "preceded" issuance of a compliance order. Relying on the Fourth Circuit's holding in *S. Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir. 1990), the district court concluded that "because . . . judicial review of a compliance order is pre-enforcement review . . . then it necessarily follows that judicial review at a stage even more preliminary is also precluded." *Lotz Realty Co.*, 757 F. Supp. at 695; *see also Coxco Realty v. U.S. Army Corps of Eng'rs*, No. 3:06-CV-416-S, 2008 WL 640946 at *6 (W.D. Ky. 2008) (holding that if "judicial review of a compliance order is pre-enforcement review precluded by the statute, then it necessarily follows that judicial review at a stage even more preliminary, such as a jurisdictional determination, is also precluded.") (citing *Southern Ohio Coal Co. v. Office of Surface Mining*, 20 F.3d 1418 (6th Cir. 1994)).

Most recently the district courts have barred review of EPA and Corps decisions regarding traditional navigable water (TNW)[18] determinations. In *National Association of*

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[18] The term "traditional navigable waters" (TNWs) is a legal term of art referring to waters that "are presently

Homebuilders v. EPA, 731 F. Supp. 2d 50, 51 (D.D.C. 2010), trade associations challenged the EPA and Corps's determinations that two reaches of the Santa Cruz River in Arizona are TNWs. NAHB argued that cases challenging compliance orders were inapplicable to its lawsuit because TNW determinations are not based on an individual landowner's conduct, impact multiple stakeholders, and do not involve any type of enforcement action. The court found the distinction immaterial, noting that "the dispositive factor is the timing of the court's review, rather than the specific pre-enforcement action of which the court's review is sought." *National Association of Homebuilders*, 731 F. Supp. 2d at 55. Thus, the court concluded that because TNW determinations are even more preliminary than compliance orders, cease-and-desist orders, or even jurisdictional determinations, one must conclude that judicial review of TNW determinations are also barred. *Id.*

Therefore, similar to the decisions above, the Ninth Circuit's holding will impact review of agency decisions occurring earlier in time than a compliance order. These decisions have immediate importance to farmers, developers, miners and homeowners – in short, all people who own land and want to use it.

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used, or have been used in the past, or may be susceptible for use to transport some type of interstate or foreign commerce." 33 C.F.R. § 329.4; *see also The Daniel Ball*, 77 U.S. 557 (10 Wall. 557) (1870); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408 (1940).

CONCLUSION

For the reasons state above, the Court should grant certiorari and reverse the decision of the U.S. Court of Appeals for the Ninth Circuit.

DATED: March 28, 2011.

Respectfully submitted,

Danielle Quist
American Farm Bureau
Federation and
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APPENDIX

TABLE OF APPENDICES

Appendix A ..... App. A1

Sackett, Administrative Compliance Order ..... App. B1

APPENDIX A

Cases in which NAHB has appeared as an *amicus curiae* or "of counsel" before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S.

528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370 (2006); *Rapanos v. United States*, 547 U.S. 715 (2006); *NAHB v. Defenders of Wildlife*, 55 U.S. 644 (2007); *John R. Sand and Gravel Co. v. United States*, 551 U.S. 130 (2008); *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009); *Entergy Corp. v. Envtl. Prot. Agency*, 129 S. Ct. 1498 (2009); and *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008); *Coeur Alaska, Inc. v. Southeast Alaska Cons. Council*, 129 S. Ct. 2458 (2009); *Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010); *United States v. Tohono O'odham Nation*, 559 F.3d 1284 (Fed. Cir. 2009), *cert. granted*, 130 S. Ct. 2097 (2010) (No. 09-846); *Am. Elec. Power Co., Inc. v. Connecticut*, 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 131 S. Ct. 813 (2010) (No. 10-174).

APPENDIX B

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

Reply to
Attn Of: ETPA-083

SENT VIA CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Chantell and Michael Sackett
P.O. Box 425
Nordman, ID 83848-0368

Re: ***In the Matter of Chantell and Michael Sackett***
Administrative Compliance Order, EPA
Docket No. CWA-10-2008-0014

Dear Mr. and Mrs. Sackett:

Enclosed is an administrative compliance order ("Compliance Order") issued to you pursuant to Sections 308 and 309(a) of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1318 and 1319(a). The U.S. Environmental Protection Agency ("EPA") is issuing this order in connection with the unauthorized placement of fill material into wetlands at your property located at 1604 Kalispell Bay Road near Kalispell Creek, Bonner County, Idaho ("Site"). The Compliance Order requires you to perform specified restoration activities and provide certain specified

information. It incorporates a Scope of Work for a Restoration Work Plan that includes specific elements for removal of the unauthorized fill, restoration of the site, time frames, and monitoring.

Please note that successful completion of the work required by the enclosed Compliance Order does not preclude EPA from bringing a formal enforcement action for penalties or further injunctive relief to address the CWA violations associated with your property located at the Site. Please also be aware that failure to comply with the Compliance Order may subject you to civil penalties of up to $32,500 per day for each violation, administrative penalties of up to $11,000 per day for each day during which the violation continues or a civil action in Federal court for injunctive relief, pursuant to Section 309 of the CWA, 33 U.S.C. §1319.

Please review the enclosed Compliance Order and Scope of Work, and contact Mr. John Olson at (208) 378-5756, if you have any technical questions concerning this order. If you have any legal questions concerning the order, then please contact Ankur Tohan, Assistant Regional Counsel, at (206) 553-1796, or ask your attorney to contact Mr. Tohan, if you are represented by counsel.

Sincerely,

/s/ Michelle Pirzadeh

Michelle Pirzadeh,
Director
Office of Ecosystems, Tribal and
Public Affairs

cc: Greg Taylor, ID Dept. of Water Resources
Beth Reinhart, U.S. Army Corps of Engineers

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

In the Matter of:	)	
	)	DOCKET NO.
CHANTELL AND	)	CWA-10-2008-0014
MICHAEL SACKETT	)	
Bonner County, Idaho	)	
	)	
	)	COMPLIANCE ORDER
Respondents.	)	
	)	
_____	)	

The following FINDINGS AND CONCLUSIONS are made and ORDER issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by sections 308 and 309(a) of the Clean Water Act ("the Act"), 33 U.S.C. §§ 1318 and 1319(a). This authority has been delegated to the Regional Administrator, Region 10, and has been duly redelegated to the undersigned Director of the Office of Ecosystems, Tribal and Public Affairs.

I. FINDINGS AND CONCLUSIONS

1.1 Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into waters of the United States by any person, except as authorized by a permit issued pursuant to section 402 or 404 of the Act, 33 U.S.C. §§ 1342 or 1344. The unpermitted discharge of any pollutant from a point source constitutes a violation of section 301(a) of the Act, 33 U.S.C. § 1311(a). Section 502(12), 33 U.S.C. § 1362(12), defines the term "discharge of any pollutant" to include "any addition of any pollutant to navigable waters from any point source." "Navigable waters" are defined as "waters of the United States." 33 U.S.C. § 1362(7).

1.2 Respondents Chantell and Michael Sackett (hereinafter collectively "Respondents") are "persons" within the meaning of Sections 301(a) and 502(5) of the Act, 33 U.S.C. §§ 1311(a) and 1362(5).

1.3 Respondents own possess, or control real property identified as 1604 Kalispell Bay Road near Kalispell Creek, Bonner County, Idaho; and located within Section 12, Township 60 North, Range 5 West, Boise Meridian ("Site"). The Site is adjacent to Priest Lake, and bounded by Kalispell Bay Road on the north and Old Schneider Road on the south.

1.4 The Site contains wetlands within the meaning of 33 C.F.R. § 328.4(8)(b); the wetlands meet the criteria for jurisdictional wetlands in the 1987 "Federal Manual for Identifying and Delineating Jurisdictional Wetlands."

1.5 The Site's wetlands are adjacent to Priest Lake within the meaning of 33 C.F.R. § 328.4(8)(c). Priest Lake is a "navigable water" within the meaning of section 502(7) of the Act, 33 U.S.C. § 1362(7), and "waters of the United States" within the meaning of 40 C.F.R § 232.2.

* * *

1.13 Each day the fill material remains in place without the required permit constitutes an additional day of violation of Section 301(a) of the Act, 33 U.S.C. § 1311 (a).

1.14 Taking into account the seriousness of this violation and Respondents' good faith efforts to comply with applicable requirements, the schedule for compliance contained in the following Order is reasonable and appropriate.

II. ORDER

Based upon the foregoing FINDINGS AND CONCLUSIONS and pursuant to sections 308 and 309(a) of the Clean Water Act, 33 U.S.C. §§ 1318 and 1319(a), it is hereby ORDERED as follows:

2.1 Respondents shall immediately undertake activities to restore the Site in accordance with the Restoration Work Plan, as detailed in the "Scope of Work." Attachment 1.

2.2 Fill shall be removed and wetland soil returned no later than **April 15, 2008**.

2.3 At least 48 hours prior to commencing removal activity on the Site, Respondents shall provide verbal notification to the EPA representative identified in Paragraph 2.12 below.

2.4 Within 3 days of completion of the earthmoving work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2:12 below. The written notification shall include photographs of Site conditions prior to and following earthmoving activities.

2.5 Upon receipt of the notification referenced under Paragraph 2.4 above, EPA will schedule as promptly as possible an inspection of Site by EPA or its designated representative.

2.6 Respondents shall complete re-planting the Site by **April 30, 2008.**

2.7 Respondents shall provide and/or obtain access to the Site and any off-Site areas to which access is necessary to implement this Order; and shall provide access to all records and documentation related to the conditions at the Site and the restoration activities conducted pursuant to this Order. Such access shall be provided to EPA employees and/or their designated representatives, who shall be permitted to move freely at the site and appropriate off-site areas in order to conduct actions that EPA determines to be necessary.

2.8 Within 7 days of completion of replanting work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 below. The

written notification shall include photographs of Site conditions prior to and following re-planting.

2.9 Upon receipt of the notification referenced under Paragraph 2.8 above, EPA will schedule as promptly as possible with Respondents an inspection of Site by EPA or its designated representative.

2.10 Failure to timely and appropriately implement to EPA's satisfaction any removal activities or conditions specified above or under the Restoration Work Plan shall be deemed a violation of this Order.

2.11 EPA encourages Respondents to engage in informal discussion of the terms and requirements of this Order upon receipt. Such discussions should address any allegations herein which Respondents believe to be inaccurate or requirements which may not be attainable and the reasons why. Alternative methods to attain the objectives of this Order may be proposed. If acceptable to EPA, such proposals may be incorporated into amendments to this Order at EPA's discretion.

2.12 All submissions, and notifications required by this Order shall be sent to:

John Olson
U.S. EPA, Idaho Operations Office
1435 North Orchard Street
Boise, ID 83706
Phone: (208) 378-5756
Fax: (208) 378~5744

2.13 Prior to the completion of the terms of this Order, including the attached Scope of Work, Respondents shall provide any successor in ownership, control, operation, or any other interest in all or part of the Site, a copy of this Order at least 30 days prior to the transfer of such interest. In addition, Respondents shall simultaneously notify the EPA representative identified in Paragraph 2.12 in writing that the notice required in this Section was given. No real estate transfer or real estate contract shall in any way affect Respondent's obligation to comply fully with the terms of this Order.

2.14 This Order shall become effective on the date it is signed.

III. SANCTIONS

3.1 Notice is hereby given that violation of, or failure to comply with, the foregoing Order may subject Respondents to (1) civil penalties of up to $32,500 per day of violation pursuant to section 309(d) of the Act, 33 U.S.C. § 1319(d), and 40 C.F.R. Part 19; (2) administrative penalties of up to $11,000 per day for each violation, pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g), and 40 C.F.R. Part 19; or (3) civil action-in federal court for injunctive relief, pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b).

3.2. Nothing in this Order shall be construed to relieve Respondents of any applicable requirements of federal, state, or local law. EPA reserves the right to take enforcement action as authorized by law for any violation of this Order, and/or any future or past violation of any permit issued pursuant to the Act or of any other

applicable legal requirements, including, but not limited to, the violations identified in Part I of this Order.

Dated this 26th day of November, 2007

/s/ Michelle Pirzadeh
MICHELLE PIRZADEH, Director
Office of Ecosystems, Tribal and Public Affairs

App. B11

Attachment 1

SCOPE OF WORK
RESTORATION WORK PLAN
1604 Kalispell Bay Road near Kalispell Creek,
Bonner County, Idaho
Section 12, Township 60 North, Range 5 West, Boise Meridian

Chantell and Michael Sackett ("Respondents")
P.O.Box 425
Nordman, ID 83848-0368

EPA Docket No. CWA-10-2008-0014

I. Introduction

In order to restore the area impacted by the unauthorized discharge of fill material into waters of the United States, Respondents shall remove all Unauthorized fill material placed within wetlands located at Section 12, Township 60 North, Range 5 West, Boise Meridian ("Site"). To the maximum extent practicable, the Site shall be restored to its' original, pre-project topographic and vegetative condition. The original vegetative condition at the Site was mature palustrine scrub-shrub wetland with a high diversity of native plants. Acceptable reference conditions exist on the adjacent wetland.

To this end, Respondents and/or their agent(s) shall implement this Restoration Work Plan, as referenced in Section II of the Compliance Order ("Order").

II. Restoration activities

1. Remove all unauthorized fill at the Site (after providing verbal notification to the EPA representative identified in Paragraph 2.12 of the Order, at least 48 hours in advance of fill removal activity). Fill removal shall be accomplished from the fill area and no work shall take place with equipment in the adjacent wetland. Removed fill shall be disposed of in an approved upland site.

2. Return all wetland soil that was previously removed from the Site. Level the soil to the pre-project elevations on the Site.

3. Notify (in writing) the EPA representative identified in Paragraph 2.12 of the Order within 3 days of completion of the earthmoving work. The written notification shall include photographs of Site conditions prior to and following earthmoving activities.

4. Fill shall be removed and wetland soil returned no later than April 15, 2008 (see schedule below). After removal, and prior to planting, Respondents shall notify the EPA representative identified in Paragraph 2.12 of the Order so that an inspection of the site can be conducted to determine if fill removal and soil placement has been successful.

5. The entire Site shall be planted with container stock of native scrub-shrub, broad-leaved deciduous wetland plants and seeded with native herbaceous wetland plants. Plantings shall include the species which were removed from the Site. Trees and tall shrub species shall be planted approximately 10 feet apart on center over the entire Site. Fast growing, native perennial woody species common to wetland areas of northern Idaho shall be incorporated into the plantings. Acceptable species include: red-osier dogwood (*Cornus stolonifera*), Douglas hawthorne (*Crataegus douglasii*), white alder (*Alnus incana*), paper birch (*Betula papyrifera*), larch (*Larix occidentalis*) and western red cedar (*Thuja plicata*). Low shrub species shall be planted approximately 18-24 inches apart on center over the entire site. Acceptable species include Douglas' spirea (*Spiraea douglasii*) and Wood's rose (*Rosa woodsii*). The entire site shall be seeded with an herbaceous seed mix of acceptable species: *Carex interior* (Inland sedge), *Carex rostrata* (Beaked sedge), *Carex aquatilis* (Water sedge), *Juncus balticus* (Baltic rush), *Pentaphylloides floribunda* (shrubby cinquefoil), *Deschampsia caespitosa* (tufted hairgrass), and *Phleum pratense* (common timothy).

6. The seed mix and container stock shall be obtained from a local or regional source, and shall consist of appropriately-sized container stock to ensure success of the restoration (e.g., 10 cubic inch containers or larger for woody and herbaceous species).

7. Seeding and planting shall be completed no later than **April 30, 2008**. Within 7 days of completion of re-planting work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 in the Order. The written notification shall include photographs of Site conditions prior to and following re-planting.

8. The Site shall be fenced for the first three growing seasons.

9. The following conditions shall be followed during restoration of the area to ensure violations of the state water quality standards do not occur:

- Removal of fill and planting will be conducted in such a manner so as to minimize turbidity and comply with Idaho Water Quality Standards and Wastewater Treatment Requirements.

- All fuel, oil and other hazardous materials will be stored arid equipment refueled away from the wetland.

- All areas subject to erosion as a result of fill removal and planting will be protected by suitable methods of erosion control. These measures shall include but not be limited to applying mulch to all exposed soils.

- The use of fertilizers, pesticides, and herbicides will be consistent with label instructions.

III. Monitoring activities

1. Monitoring of vegetation on the restored Site for survival and ground coverage shall be performed in October 2008, June 2009, October 2009, and October 2010.

2. Successful restoration shall require 75% of groundcover established under native wetland species. Any replanted woody and herbaceous plants that are included in the 75% criterion must have survived at least two complete growing seasons. Flexibility of the performance standard may be allowed based on the best professional judgment of U.S. EPA personnel's evaluation of current site conditions, and a demonstration of good faith efforts by Respondents to maintain the health and condition of the restored wetland within that three-year period.

3. A monitoring report shall be prepared and submitted to EPA within 30 days of each prescribed monitoring event. The report shall include photographic evidence as well as monitoring results. All photographs must be labeled with the date, location, and point of reference (e.g., facing north and looking at southern edge of Site). In addition, the monitoring report shall identify any problems discovered and recommend appropriate corrective action(s) to ensure the success of restoration. If monitoring reports show that vegetation survival is not adequate to meet the

success criteria, Respondents shall provide EPA a plan to achieve restoration at the Site. EPA may require modifications to the plan prior to its approval and implementation.

IV. Inspection activities

1. The property owner shall notify, and allow for inspections by, EPA personnel or their designated agent after completion of fill removal activities, after completion of planting activities, whenever any corrective action(s) are proposed, and after monitoring indicates that the criteria for success have been attained.

VI. SCHEDULE

1. The Restoration Plan shall be designed to accomplish restoration in accordance with the following schedule:

Action	Commencement No Later Than	Completion No Later Than
Fill shall be removed and wetland soil returned	April 1, 2008	April 15, 2008[1]
EPA or its representative conducts an inspection of Site	As soon as possible after notification	Prior to planting
Re-Planting of the entire Site	April 15, 2008	April 30, 2008[2]
Monitoring of the entire Site	October 1, 2008	October 31, 2008
Monitoring of the entire Site	June 1, 2009	June 31, 2009
Monitoring of the entire Site	October 1, 2009	October 31, 2009
Monitoring of the entire Site	October 1, 2010	October 31, 2010

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1. At least 48 hours prior to commencing removal activity on the Site, Respondents shall provide verbal notification to the EPA representative identified in Paragraph 2.12 of the Order. Within 3 days of completion of the earthmoving work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 of the Order. The written notification shall include photographs of Site conditions prior to and following earthmoving activities.

2. Within 7 days of completion of re-planting work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 of the Order. The written notification shall include photographs of Site conditions prior to and following re-planting.

JOINT APPENDIX

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
SEP 2 3 2010
OFFICE OF THE CLERK

No. 10-1062

In the
Supreme Court of the United States

CHANTELL SACKETT and MICHAEL SACKETT,

Petitioners,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
and LISA P. JACKSON, Administrator,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX

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Counsel for Petitioners

Petition for Writ of Certiorari filed Feb. 23, 2011
Petition for Writ of Certiorari granted June 28, 2011

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TABLE OF CONTENTS

Chronological List of Relevant Docket Entries of the United States District Court for the District of Idaho 1

Chronological List of Relevant Docket Entries of the United States Court of Appeals for the Ninth Circuit 3

Complaint for Declaratory and Injunctive Relief (Apr. 28, 2008) 5

Letter modifying terms of the November 26, 2007, Compliance Order (May 1, 2008) 43

Amended Compliance Order (May 15, 2008) 47

Judgment (Aug. 7, 2008) 57

The following items have not been listed in the Joint Appendix because they can be found in the Petition for Writ of Certiorari on the following pages:

Memorandum Order (Aug. 7, 2008) C-1

Opinion (Sept. 17, 2010) A-1

Order (Nov. 29, 2010) D-1

Mandate (Dec. 9, 2010) B-1

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

CHANTELL and MICHAEL SACKETT,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and STEPHEN L. JOHNSON, in his official capacity as Administrator of the Environmental Protection Agency,

Defendants.

No. 2:08-cv-00185-EJL

Apr. 28, 2008	Complaint for Declaratory and Injunctive Relief
May 16, 2008	United States' Motion to Dismiss Plaintiffs' Complaint for Lack of Subject Matter Jurisdiction
May 30, 2008	Plaintiffs' Opposition to United States' Motion to Dismiss Complaint for Lack of Subject Matter Jurisdiction

June 6, 2008	United States' Reply Memorandum in Support of Motion to Dismiss Plaintiffs' Complaint for Lack of Subject Matter Jurisdiction
Aug. 7, 2008	Memorandum Order granting Motion to Dismiss for Lack of Jurisdiction
Aug. 7, 2008	Judgment
Aug. 20, 2008	Plaintiffs' Motion for Clarification and for Reconsideration (FRCP 60(a); FRCP 59(e))
Sept. 24, 2008	United States' Memorandum in Opposition to Plaintiffs' Motion for Clarification and for Reconsideration
Sept. 26, 2008	Plaintiffs' Reply in Support of Their Motion for Clarification and for Reconsideration
Oct. 9, 2008	Order denying Motion for Clarification and for Reconsideration
Oct. 16, 2008	Plaintiffs' Notice of Appeal

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHANTELL SACKETT;
MICHAEL SACKETT,

Plaintiffs - Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; STEVEN L. JOHNSON, Administrator,

Defendants - Appellees.

No. 08-35854

Oct. 20, 2008	Time Schedule Order
Nov. 28, 2008	Appellants' Opening Brief
Jan. 14, 2009	Response Brief of the Federal Defendants-Appellees
Jan. 30, 2009	Appellants' Reply Brief
Dec. 9, 2009	Argued and Submitted to Robert R. Beezer, Ronald M. Gould, and Richard C. Tallman
Dec. 9, 2009	Order deferring case to allow the parties to consider mediation

Dec. 23, 2009	Order re: parties have agreed to attempt to resolve their dispute through mediation; submission of the case is withdrawn, and submission is deferred pending conclusion of the mediation
Aug. 18, 2010	Order re: case deemed resubmitted; parties have indicated their dispute cannot be resolved through mediation
Sept. 17, 2010	Opinion affirming trial court decision
Oct. 29, 2010	Appellants' Petition for Rehearing *En Banc*
Nov. 29, 2010	Order denying Petition for Rehearing *En Banc*
Dec. 9, 2010	Mandate
Feb. 25, 2011	Notice from the United States Supreme Court that the petition for writ of certiorari has been filed and docketed

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO,
NORTHERN DIVISION

Filed Apr. 28, 2008

CHANTELL and MICHAEL SACKETT, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and STEPHEN L. JOHNSON, in his official capacity as Administrator of the Environmental Protection Agency, Defendants.	)	Case No. 2:08-cv-00185-EJL **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. Plaintiffs Chantrell and Michael Sackett bring this action for injunctive and declaratory relief under the Clean Water Act (CWA), 33 U.S.C. § 1251, *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq.*

2. Defendants United States Environmental Protection Agency and Stephen L. Johnson have issued a compliance order under the CWA to Plaintiffs, determining that Plaintiffs' property is subject to the CWA, and that Plaintiffs have illegally placed fill

material on their property. The compliance order requires Plaintiffs immediately to begin substantial and costly restoration work, including removal of the fill material, replanting, and a three-year monitoring program during which the property must be left untouched. The compliance order subjects Plaintiffs to significant civil penalties for failure to comply. The compliance order was issued without providing Plaintiffs an opportunity to be heard and to contest Defendants' findings.

3. Plaintiffs therefore seek by this action a declaration that Plaintiffs' property is not subject to the CWA, and that enforcement of the compliance order without providing Plaintiffs a hearing violates Plaintiffs' procedural due process rights. Further, Plaintiffs seek an injunction enjoining Defendants from enforcing the compliance order without first providing Plaintiffs a hearing.

JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); § 2201 (authorizing declaratory relief); § 2202 (authorizing injunctive relief); and 5 U.S.C. § 702 (providing for judicial review of agency action under the APA).

5. Venue in this judicial district is proper under 28 U.S.C. § 1391(e)(2), because the property that is the subject of the action is situated here.

PARTIES

6. Plaintiffs Chantell and Michael Sackett own the property that is the subject of this action. Plaintiffs own Sackett Construction, a small

construction company located at Priest Lake, Idaho. They do work around Priest Lake, and also on projects further south in Coeur D'Alene and Spokane. Plaintiffs purchased the property with the intention to build a house on it. They applied for and obtained the requisite building permits. Nothing in the title documents or title policy indicated any limitation on development.

7. Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (EPA) is an agency of the United States established pursuant to Reorganization Plan No. 3 of 1970, 84 Stat. 2086. It is the agency with primary responsibility for the enforcement of the CWA.

8. Defendant STEPHEN L. JOHNSON is the Administrator of EPA, and oversees EPA's enforcement of the CWA. He is sued in his official capacity only.

LEGAL BACKGROUND

9. In 1972, Congress enacted the CWA to regulate the navigable waters of the United States.

10. Section 404 of the CWA, 33 U.S.C. § 1344, authorizes EPA to issue permits for the discharge of dredge and fill material into the navigable waters of the United States.

11. Section 301(a), *id.* § 1311(a), prohibits the unpermitted discharge of dredge and fill material into the navigable waters of the United States.

12. Sections 308 and 309, *id.* §§ 1318, 1319(a), authorize EPA to issue compliance orders for violations of the CWA, including unpermitted discharges of dredge and fill material into the navigable waters of the United States.

13. Section 502(7), *id.* § 1362(7), defines "navigable waters" to mean the "waters of the United States, including the territorial seas."

14. The EPA has promulgated regulations to define "waters of the United States." *See* 40 C.F.R. § 230.3(s).

15. Under those regulations, navigable waters, interstate waters, intrastate waters with uses that could affect interstate or foreign commerce, impoundments of waters, tributaries of waters, territorial seas, and wetlands adjacent to other waters that are not themselves wetlands, are considered "waters of the United States." *See id.* § 230.3(s)(1)-(7).

16. In 2001, the United States Supreme Court, in *Solid Waste Agency of Northen Cook County v. United States Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001), held that isolated, intrastate non-navigable bodies of water are not "waters of the United States."

17. In response to the *SWANCC* opinion, the EPA (with the Army Corps) issued an Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," seeking comment on whether and how 40 C.F.R. § 230.3 should be amended to account for the Supreme Court's decision. *See* 68 Fed. Reg. 1991 (Jan. 15, 2003).

18. The EPA did not follow through with rulemaking.

19. In 2006, the Supreme Court held in a split decision that the CWA does not provide the EPA with jurisdiction over certain wetlands that are connected to nonnavigable tributaries of traditional navigable

waters. *See Rapanos v. United States*, 547 U.S. 715 (2006).

20. Subsequently, the Ninth Circuit held that the controlling jurisdictional test in *Rapanos* is found in the concurring opinion of Justice Kennedy, and that the controlling standard for CWA jurisdiction is the Kennedy opinion's "significant nexus" test. *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007).

21. A significant nexus exists between wetlands and a navigable water "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment). "When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.*

22. The EPA's method for identifying wetlands is governed by the 1987 *Federal Manual for Identifying and Delineating Jurisdictional Wetlands*. The Manual interprets the EPA's regulations defining "waters of the United States," 40 C.F.R. § 230.3(s).

FACTUAL ALLEGATIONS

23. Plaintiffs own a .63-acre dirt lot parcel located at 1604 Kalispell Bay Road, in Bonner County, Idaho. The property is presently undeveloped. The property is bounded to the north by Kalispell Bay Road, to the east and west by undeveloped lots, and to the south by Old Schneider Road.

24. The property lies to the north of Priest Lake. A ditch runs along the north side of Kalispell Bay Road. Water in that ditch flows westward until discharging in Kalispell Creek, which is approximately 500 feet west of the property. There is no ditch on the south side of Kalispell Road. Between the property and Priest Lake are several developed lots with numerous permanent structures.

25. There is no surface water connection between the property and Kalispell Creek. Further, there is no surface water connection between the property and Priest Lake.

26. The property does not, either by itself or in combination with similarly situated properties in the area, substantially affect the physical, chemical, and biological integrity of Kalispell Creek, Priest Lake, or any other water body.

27. On November 26, 2007, Defendants issued a compliance order to Plaintiffs, determining that the property is subject to the CWA, and that Plaintiffs had illegally placed one half acre of fill material on the property. *See* Attachment A. The order determined that the property is a wetland under the 1987 Manual, and that the property is adjacent to Priest Lake. The order mandated that the fill material be removed by April 15, 2008, and that the property be replanted by April 30, 2008. Further, the order required that the site be fenced off for three growing seasons. Lastly, the order stated that failure to comply with the order may subject Plaintiffs to civil penalties of up to $32,500 per day and administrative penalties of up to $11,000 per each continuing violation. Therefore, the order constitutes final agency action.

28. On April 1, 2008, Plaintiffs' counsel responded to the compliance order. *See* Attachment B. In that response, Plaintiffs stated that the property is not a wetland under the 1987 Manual, and that the property is not subject to CWA jurisdiction under *Rapanos*. Further, Plaintiffs' response demanded that Defendants provide Plaintiffs an opportunity to be heard and to contest Defendants' determinations, or else treat the compliance order as unenforceable and without legal effect.

29. On April 4, 2008, Defendants, through a letter to Plaintiffs, extended the compliance order's deadlines, requiring that dredge and fill material removal begin by May 1, 2008, with replanting to be completed by May 30, 2008. *See* Attachment C.

30. On April 11, 2008, Defendants, through a letter to Plaintiffs' counsel, acknowledged receipt of Plaintiffs' April 1 letter of contest and reaffirmed, but without further explanation, their position that the property is subject to the CWA. *See* Attachment D.

INJUNCTIVE RELIEF ALLEGATIONS

31. Plaintiffs hereby reallege and incorporate by reference the allegations contained in Paragraphs 1 through 30 as though fully set forth herein.

32. If an injunction does not issue enjoining Defendants from enforcing the compliance order against Plaintiffs, Plaintiffs will be irreparably harmed. Plaintiffs are presently and continuously injured by the compliance order's issuance because its issuance and coincident threat of enforcement will force Plaintiffs either to restore their property essentially to its original condition at great expense, or

to subject themselves to severe civil and criminal penalties.

33. Plaintiffs have no plain, speedy, and adequate remedy at law.

34. If not enjoined by this Court, Defendants will continue to threaten to, and actually, enforce the compliance order in derogation of Plaintiffs' rights.

35. Defendants' compliance order is a final agency action subject to judicial review. *See* 5 U.S.C. § 702.

36. Accordingly, injunctive relief is appropriate.

DECLARATORY RELIEF ALLEGATIONS

37. Plaintiffs hereby reallege and incorporate by reference the allegations contained in Paragraphs 1 through 36 as though fully set forth herein.

38. An actual and substantial controversy exists between Plaintiffs and Defendants over Defendants' failure to comply with the CWA, the APA, and the Constitution in determining that Plaintiffs' property is subject to the CWA and that Plaintiffs can be held liable for violation of the compliance order, or the alleged underlying violation, without proof of a violation or an opportunity to be heard.

39. Defendants' compliance order is a final agency action subject to judicial review. *See* 5 U.S.C. § 702.

40. This case is presently justiciable because Defendants' failure to comply with these laws is the direct result of final agency action that has caused and will continue to cause immediate and concrete injury to Plaintiffs. Plaintiffs are presently and continuously injured by the compliance order's issuance because its issuance and coincident threat of enforcement will

force Plaintiffs to restore their property to its original condition at great expense, or to subject themselves to severe civil and criminal penalties.

41. Declaratory relief is, therefore, appropriate to resolve this controversy.

FIRST CLAIM FOR RELIEF

(Statutory Violation)

42. Plaintiffs hereby reallege and incorporate by reference the allegations contained in Paragraphs 1 through 41 as though fully set forth herein.

43. Plaintiffs' property is not subject to the CWA under the controlling *Rapanos* decision because Plaintiffs' property (1) does not substantially affect. either by itself or in combination within similar properties in the area, the physical, chemical, and biological integrity of any traditional navigable water, and (2) is not connected to any other body of water such that one cannot discern where that body of water ends and the property begins.

44. Defendants' determination that Plaintiffs' property is subject to the CWA is, therefore, arbitrary and capricious, and contrary to law. *See* 5 U.S.C. § 706(2).

SECOND CLAIM FOR RELIEF

(Constitutional Violation)

45. Plaintiffs hereby reallege and incorporate by reference the allegations contained in Paragraphs 1 through 44 as though fully set forth herein.

46. Defendants' issuance of a compliance order threatening imminent imposition of civil and criminal

penalties without first providing Plaintiffs an opportunity to be heard violates Plaintiffs' procedural due process rights. *See* U.S. Const. amend. V.

47. The compliance order is therefore null and void, and without legal effect.

THIRD CLAIM FOR RELIEF

(Constitutional Violation)

48. Plaintiffs hereby reallege and incorporate by reference the allegations contained in Paragraphs 1 through 47 as though fully set forth herein.

49. Section 309(a)(1) of the CWA authorizes issuance, "on the basis of any information available," *see* 33 U.S.C. § 1319(a)(1), of a compliance order whose violation incurs significant civil penalties. Defendants have issued a compliance order against Plaintiffs pursuant to Section 309(a)(1). Defendants have thereby violated Plaintiffs' substantive due process rights, because the standard for issuance of a compliance order is impermissibly vague and does not afford an adequate basis for judicial review. *See* U.S. Const. amend. V.

50. Section 309(a)(1) of the CWA is therefore unconstitutional as applied to Plaintiffs, and is null and void.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for judgment as follows:

1. A declaration that Plaintiffs' property is not subject to the CWA.

2. A declaration that Defendants' compliance order is constitutionally invalid and not enforceable.

3. A declaration that Section 309(a)(1) of the CWA, authorizing issuance of compliance orders "on the basis of any information available," is unconstitutional and void for vagueness, as applied to Plaintiffs.

4. An injunction enjoining Defendants from taking any enforcement action, or imposing any penalty, against Plaintiffs.

5. For an award of attorneys' fees, expenses, and costs; and,

6. For such other relief as the Court deems just and proper.

DATED: April 28, 2008.

Respectfully submitted,

LESLIE R. WEATHERHEAD
Witherspoon Kelley Davenport & Toole

M. REED HOPPER
DAMIEN M. SCHIFF
Pacific Legal Foundation

By /s/ Leslie R. Weatherhead
LESLIE R. WEATHERHEAD
Idaho Bar No. 3916
Telephone: (509) 624-5265

Attorneys for Plaintiffs

Attachment A

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

Nov. 26, 2007

SENT VIA CERTIFIED MAIL-
RETURN RECEIPT REQUESTED

Chantell and Michael Sackett
P.O. Box 425
Nordman, ID 83848-0368

Re: ***In the matter of Chantell and Michael Sackett***
Administrative Compliance Order,
EPA Docket No. CWA-10-2008-0014

Dear Mr. and Mrs. Sackett:

Enclosed is an administrative compliance order ("Compliance Order") issued to you pursuant to Sections 308 and 309(a) of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1318 and 1319(a). The U.S. Environmental Protection Agency ("EPA") is issuing this order in connection with the unauthorized placement of fill material into wetlands at your property located at 1604 Kalispell Bay Road near Kalispell Creek, Bonner County, Idaho ("Site"). The Compliance Order requires you to perform specified

restoration activities and provide certain specified information. It incorporates a Scope of Work for a Restoration Work Plan that includes specific elements for removal of the unauthorized fill, restoration of the site, time frames, and monitoring.

Please note that successful completion of the work required by the enclosed Compliance Order does not preclude EPA from bringing a formal enforcement action for penalties or further injunctive relief to address the CWA violations associated with your property located at the Site. Please also be aware that for each violation, administrative penalties of up to $11,000 per day for each day during which the violation continues or a civil action in Federal court for injunctive relief, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

Please review the enclosed Compliance Order and Scope of Work, and contact Mr. John Olson at (208) 378-5756, if you have any technical questions concerning this order. If you have any legal questions concerning this order, then please contact Ankur Tohan, Assistant Regional Counsel, at (206) 553-1796, or ask your attorney to contact Mr. Tohan, if you are represented by counsel.

Sincerely,

/s/ Michelle Pirzadeh
Michelle Pirzadeh, Director
Office of Ecosystems, Tribal
and Public Affairs

cc: Greg Taylor, ID Dept. of Water Resources
Beth Reinhart, U.S. Army Corps of Engineers

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101

In the Matter of:	) DOCKET NO.
	) CWA-10-2008-0014
CHANTELL AND	)
MICHAEL SACKETT	) COMPLIANCE ORDER
	)
Bonner County, Idaho	)
	)
Respondents.	)
	)

The following FINDINGS AND CONCLUSIONS are made and ORDER issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by sections 308 and 309(a) of the Clean Water Act ("the Act"), 33 U.S.C. §§ 1318 and 1319(a). This authority has been delegated to the Regional Administrator, Region 10, and has been duly redelegated to the undersigned Director of the Office of Ecosystems, Tribal and Public Affairs.

I. FINDINGS AND CONCLUSIONS

1.1 Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into waters of the United States by any person, except as authorized by a permit issued pursuant to section 402 or 404 of the Act, 33 U.S.C. §§ 1342 or 1344. The unpermitted discharge of any pollutant from a point

source constitutes a violation of section 301(a) of the Act, 33 U.S.C. § 1311(a). Section 502(12), 33 U.S.C. § 1362(12), defines the term "discharge any pollutant" to include "any addition of any pollutant to navigable waters from any point source." "Navigable waters" are defined as "waters of the "United States." 33 U.S.C. § 1362(7).

1.2 Respondents Chantell and Michael Sackett (hereinafter collectively "Respondents") are "persons" within the meaning of Sections 301(a) and 502(5) of the Act, 33 U.S.C. §§ 1311(a) and 1362(5).

1.3 Respondents own, possess, or control real property identified as 1604 Kalispell Bay Road near Kalispell Creek, Bonner County, Idaho, and located within Section 12, Township 60 North, Range 5 West, Boise Meridian ("Site"). The Site is adjacent to Priest Lake, and bounded by Kalispell Bay Road on the north and Old Schneider Road on the south.

1.4 The Site contains wetlands within the meaning of 33 C.F.R. § 328.4(8)(b); the wetlands meet the criteria for jurisdictional wetlands in the 1987 "Federal Manual for Identifying and Delineating Jurisdictional Wetlands."

1.5 The Site's wetlands are adjacent to Priest Lake within the meaning of 33 C.F.R. § 328.4(8)(c). Priest Lake is a "navigable water" within the meaning of section 502(7) of the Act, 33 U.S.C. § 1362(7), and "waters of the United States" within the meaning of 40 C.F.R. § 232.2.

1.6 In April and May, 2007, at times more fully known to Respondents, Respondents and/or persons acting on their behalf discharged fill material into

wetlands at the Site. Respondents filled approximately one half acre.

1.7 Upon information and belief, Respondents and/or persons acting on their behalf, used heavy equipment to place the fill material into the wetlands. The heavy equipment used to fill these waters is a "point source" within the meaning of section 502(14) of the Act, 33 U.S.C. 1362(14).

1.8 The fill material that Respondents and/or persons acting on their behalf caused to be discharged included, among other, things, dirt and rock, each of which constitutes a "pollutant" within the meaning of section 502(6) of the Act, 33 U.S.C. § 1362(6).

1.9 By causing such fill material to enter waters of the United States, Respondents have engaged, and are continuing to engage, in the "discharge of pollutants" from a point source within the meaning of sections 301 and 502(12) of the Act, 33 U.S.C. §§ 1311 and 1362(12).

1.10 Respondents' discharges of dredged and/or fill material was not authorized by any permit issued pursuant to section 402 or 404 of the Act, 33 U.S.C. §§ 1312 or 1314.

1.11 Respondents discharge of pollutants into waters of the United States at the Site without permit constitutes a violation of section 301 of the Act, 33 U.S.C. § 1311.

1.12 As of the effective date of this Order, the fill material referenced in Paragraph 1.6 above remains in place.

1.13 Each day the fill material remains in place without the required permit constitutes an additional

day of violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

1.14 Taking into account the seriousness of this violation and Respondents' good faith efforts to comply with applicable requirements, the schedule for compliance contained in the following Order is reasonable and appropriate.

II. ORDER

Based upon the foregoing FINDINGS AND CONCLUSIONS and pursuant to sections 308 and 309(a) of the Clean Water Act, 33 U.S.C. §§ 1318 and 1319(a), it is hereby ORDERED as follows:

2.1 Respondents shall immediately undertake activities to restore the Site, in accordance with the Restoration Work Plan, as detailed in the "Scope of Work." Attachment 1.

2.2 Fill shall be removed and wetland soil returned no later than **April 15, 2008**.

2.3 At least 48 hours prior to commencing removal activity on the Site, Respondents shall provide verbal notification to the EPA representative identified in Paragraph 2.12 below.

2.4 Within 3 days of completion of the earthmoving work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 below. The written notification shall include photographs of Site conditions prior to and following earthmoving activities.

2.5 Upon receipt of the notification referenced under Paragraph 2.4 above, EPA will schedule as

promptly as possible an inspection of Site by EPA or its designated representative.

2.6 Respondents shall complete re-planting the Site by **April 30, 2008**.

2.7 Respondents shall provide and/or obtain access to the Site and any off-Site areas to which access is necessary to implement this Order; and shall provide access to all records and documentation related to the conditions at the Site and the restoration activities conducted pursuant to this Order. Such access shall be provided to EPA employees and/or their designated representatives, who shall be permitted to move freely at the site and appropriate off-site areas in order to conduct actions that EPA determines to be necessary.

2.8 Within 7 days of completion of re-planting work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 below. The written notification shall include photographs of Site conditions prior to and following re-planting.

2.9 Upon receipt of the notification referenced under Paragraph 2.8 above, EPA will schedule as promptly as possible with Respondents an inspection of Site by EPA or its designated representative.

2.10 Failure to timely and appropriately implement to EPA's satisfaction any removal activities or conditions specified above or under the Restoration Work Plan shall be deemed a violation of this Order.

2.11 EPA encourages Respondents to engage in informal discussion of the terms and requirements of this Order upon receipt. Such discussions should address any allegations herein which Respondents

believe to be inaccurate or requirements which may not be attainable and the reasons why. Alternative methods to attain the objectives of this Order may be proposed. If acceptable to EPA, such proposals may be incorporated into amendments to this Order at EPA's discretion.

2.12 All submissions and notifications required by this Order shall be sent to:

John Olson
U.S. EPA, Idaho Operations Office
1435 North Orchard Street
Boise, ID 83706
Phone: (208) 378-5756
Fax: (208) 378-5744

2.13 Prior to the completion of the terms of this Order, including the attached Scope of Work, Respondents shall provide any successor in ownership, control, operation, or any other interest in all or part of the Site, a copy of this Order at least 30 days prior to the transfer of such interest. In addition, Respondents shall simultaneously notify the EPA representative identified in Paragraph 2.12 in writing that the notice required in this Section was given. No real estate transfer or real estate contract shall in any way affect Respondent's obligation to comply fully with the terms of this Order.

2.14 This Order shall become effective on the date it is signed.

III. SANCTIONS

3.1 Notice is hereby given that violation of, or failure to comply with, the foregoing Order may subject Respondents to (1) civil penalties of up to $32,500 per

day of violation pursuant to section 309(d) of the Act, 33 U.S.C. § 1319(d), and 40 C.F.R. Part 19, (2) administrative penalties of up to $11,000 per day for each violation, pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g), and 40 C.F.R. Part 19; or (3) civil action in federal court for injunctive relief, pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b).

3.2 Nothing in this Order shall be construed to relieve Respondents of any applicable requirements of federal, state, or local law. EPA reserves the right to take enforcement action as authorized by law for any violation of this Order, and for any future or past violation of any permit issued pursuant to the Act or of any other applicable legal requirements, including, but not limited to, the violations identified in Part I of this Order.

Dated this 26th day of November, 2007

/s/ Michelle Pirzadeh
MICHELLE PIRZADEH, Director
Office of Ecosystems, Tribal and Public Affairs

Attachment 1

SCOPE OF WORK
RESTORATION WORK PLAN
1604 Kalispell Bay Road near Kalispell Creek,
Bonner County, Idaho
Section 12, Township 60 North, Range 5 West,
Boise Meridian

Chantell and Michael Sackett ("Respondents")
P.O. Box 425
Nordman, ID 83848-0368

EPA Docket No. CWA-10-2008-0014

I. Introduction

In order to restore the area impacted by the unauthorized discharge of fill material into waters of the United States, Respondents shall remove all unauthorized fill material placed within wetlands located at Section 12, Township 60 North, Range 5 West, Boise Meridian ("Site"). To the maximum extent practicable, the Site shall be restored to its original, pre-project topographic and vegetative condition. The original vegetative condition at the Site was mature palustrine scrub-shrub wetland with a high diversity of native plants. Acceptable reference conditions exist on the adjacent wetland.

To this end, Respondents and/or their agent(s) shall implement this Restoration Work Plan, as referenced in Section II of the Compliance Order ("Order").

II. Restoration activities

1. Remove all unauthorized fill at the Site (after providing verbal notification to the EPA

representative identified in Paragraph 2.12 of the Order, at least 48 hours in advance of fill removal activity). Fill removal shall be accomplished from the fill area and no work shall take place with equipment in the adjacent wetland. Removed fill shall be disposed of in an approved upland site.

2. Return all wetland soil that was previously removed from the Site. Level the soil to the pre-project elevations on the Site.

3. Notify (in writing) the EPA representative identified in Paragraph 2.12 of the Order within 3 days of completion of the earthmoving work. The written notification shall include photographs of Site conditions prior to and following earthmoving activities.

4. Fill shall be removed and wetland soil returned no later than **April 15, 2008** (see schedule below). After removal, and prior to planting, Respondents shall notify the EPA representative identified in Paragraph 2.12 of the Order so that an inspection of the site can be conducted to determine if fill removal and soil placement has been successful.

5. The entire Site shall be planted with container stock of native scrub-shrub, broad-leaved deciduous wetland plants and seeded with native herbaceous wetland plants. Plantings shall include the species which were removed from the Site. Trees and tall shrub species shall be planted approximately 10 feet apart on center over the entire Site. Fast growing, native perennial woody species common to wetland areas of northern Idaho shall be incorporated into the plantings. Acceptable species include: red-osier dogwood

(*Cornus stolonifera*), Douglas hawthorne (*Crataegus douglasii*), white alder (*Alnus incana*), paper birch (*Betula papyrifera*), larch (*Larix occidentalis*) and western red cedar (*Thuja plicata*). Low shrub species shall be planted approximately 18-24 inches apart on center over the entire site. Acceptable species include Douglas' spirea (*Spiraea douglasii*) and Wood's rose (*Rosa woodsii*). The entire site shall be seeded with an herbaceous seed mix of acceptable species: *Carex interior* (Inland sedge), *Carex rostrata* (Beaked sedge), *Carex aquatilis* (Water sedge), *Juncus balticus* (Baltic rush), *Pentaphylloides floribunda* (shrubby cinquefoil), *Deschampsia caespitosa* (tufted hairgrass), and *Phleum pratense* (common timothy).

6. The seed mix and container stock shall be obtained from a local or regional source, and shall consist of appropriately-sized container stock to ensure success of the restoration (e.g., 10 cubic inch containers or larger for woody and herbaceous species).

7. Seeding and planting shall be completed no later than **April 30, 2008**. Within 7 days of completion of re-planting work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 in the Order. The written notification shall include photographs of Site conditions prior to and following re-planting.

8. The Site shall be fenced for the first three growing seasons.

9. The following conditions shall be followed during restoration of the area to ensure violations of the state water quality standards do not occur:

   - Removal of fill and planting will be conducted in such a manner so as to minimize turbidity and comply with Idaho Water Quality Standards and Wastewater Treatment Requirements.
   - All fuel, oil and other hazardous materials will be stored and equipment refueled away from the wetland.
   - All areas subject to erosion as a result of fill removal and planting will be protected by suitable methods of erosion control. These measures shall include but not be limited to applying mulch to all exposed soils.
   - The use of fertilizers, pesticides, and herbicides will be consistent with label instructions.

III. Monitoring activities

1. Monitoring of vegetation on the restored Site for survival and ground coverage shall be performed in October 2008, June 2009, October 2009, and October 2010.

2. Successful restoration shall require 75% of groundcover established under native wetland species. Any replanted woody and herbaceous plants that are included in the 75% criterion must have survived at least two complete growing seasons. Flexibility of the performance standard may be allowed based on the best professional judgment of U.S. EPA personnel's evaluation of

current site conditions, and a demonstration of good faith efforts by Respondents to maintain the health and condition of the restored wetland, within that three-year period.

3. A monitoring report shall be prepared and submitted to EPA within 30 days of each prescribed monitoring event. The report shall include photographic evidence as well as monitoring results. All photographs must be labeled with the date, location, and point of reference (e.g., facing north and looking at southern edge of Site). In addition, the monitoring report shall identify any problems discovered and recommend appropriate corrective action(s) to ensure the success of restoration. If monitoring reports show that vegetation survival is not adequate to meet the success criteria, Respondents shall provide EPA a plan to achieve restoration at the Site. EPA may require modifications to the plan prior to its approval and implementation.

IV. Inspection activities

1. The property owner shall notify, and allow for inspections by, EPA personnel or their designated agent after completion of fill removal activities, after completion of planting activities, whenever any corrective action(s) are proposed, and after monitoring indicates that the criteria for success have been attained.

VI. SCHEDULE

1. The Restoration Plan shall be designed to accomplish restoration in accordance with the following schedule:

Action	Commence-ment No Later Than	Completion No Later Than
Fill shall be removed and wetland soil returned	April 1, 2008	April 15, 2008[1]
EPA or its representative conducts an inspection of Site	As soon as possible after notification	Prior to planting
Re-Planting of the entire Site	April 15, 2008	April 30, 2008[2]
Monitoring of the entire Site	October 1, 2008	October 31, 2008
Monitoring of the entire Site	June 1, 2009	June 31, 2009

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[1] At least 48 hours prior to commencing removal activity on the Site, Respondents shall provide verbal notification to the EPA representative identified in Paragraph 2.12 of the Order. Within 3 days of completion of the earthmoving work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 of the Order. The written notification shall include photographs of Site conditions prior to and following earthmoving activities.

[2] Within 7 days of completion of re-planting work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 of the Order. The written notification shall include photographs of Site conditions prior to and following re-planting.

Action	Commencement No Later Than	Completion No Later Than
Monitoring of the entire Site	October 1, 2009	October 31, 2009
Monitoring of the entire Site	October 1, 2010	October 31, 2010

Attachment B

WITHERSPOON, KELLEY, DAVENPORT & TOOLE
A PROFESSIONAL SERVICE CORPORATION
ATTORNEYS & COUNSELORS

THE SPOKESMAN REVIEW BUILDING
608 NORTHWEST BOULEVARD, SUITE 401
COEUR D'ALENE, IDAHO 87814-2146
Telephone: (208) 667-4000
Fax: (208) 667-8470

April 1, 2008

Via Facsimile 208-378-5744

Mr. John Olson
U.S. E.P.A.
Idaho Operations Office
1435 N. Orchard Street
Boise, Idaho 83706

Re: In the Matter of Chantell and Michael Sackett Administrative Compliance Order, EPA Docket No. CWA-10-2008-0014

Dear Mr. Olson:

Our firm has been retained by Chantell and Michael Sackett to represent them in the above-referenced matter. My clients are in receipt of the Administrative Compliance Order issued pursuant to Sections 308 and 309(a) of the Clean Water Act, 33

U.S.C. §§ 1318 and 1319(a). This Order was issued in connection with the placement of fill material at the property located at 1604 Kalispell Bay Road near Kalispell Creek, Bonner County, Idaho ("Site").

The purpose of this letter is to request that the E.P.A. afford the Sacketts a hearing as to its Compliance Order. Our clients dispute the alleged Findings of Fact and Conclusions of Law contained in the Compliance Order on the following grounds:

1. The site does not contain a wetland within the meaning of 33 C.F.R. §328.3(8)(b) and the wetlands do not meet the criteria for jurisdictional wetlands in the 1987 Federal Manual for Identifying and Delineating Jurisdictional Wetlands.

Our clients dispute the allegation that they engaged in, or are continuing to engage in, the discharge of pollutants from point source within the meaning of Sections 301 and 502(12) of the Act, 33 U.S.C. §§ 1311 and 1362(12). The Compliance Order erroneously, without foundation, concludes that Site contains wetlands within the meaning of 33 CFR §328.3(8)(b).

There is a ditch along the north side of Kalispell Bay Road which apparently flows to the west and eventually discharges into Kalispell Creek (approximately 500' west of the Site). There is no ditch along the south side of Kalispell Bay Road. There is no direct surface water connection from the Site to Kalispell Creek. Subsurface flows, if there are any at all, are likely from the north to the south (i.e., Priest Lake is south of the Site). There are no ditches or

other conveyance features, or contiguous wetlands from the Site to Priest Lake. Therefore, the Site is not a wetland. A wetland must have a connection to a traditional navigable waterway (TNW) by a tributary that is a relatively permanent waterway (RPW). A wetland, which has a continuous surface connection with a non-navigable waterway that is not relatively permanent, would not be within the jurisdiction of the United States. Only those wetlands that have a continuous surface connection to a body that is a "water of the United States" in its own right are jurisdictional. *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208, 2226 (2006). According to the *Rapanos* guidance, a body that is a "water of the United States" in its own right includes TNWs and tributaries of the TNW that are RPWs. *Id.* at 2222-25. Thus, a wetland that has a continuous surface connection to a TNW or a tributary that is a RPW is within the jurisdiction of the United States. To the contrary, a wetland that has a continuous surface connection with a non-navigable waterway that is not relatively permanent would not be within federal jurisdiction.

The plurality in *Rapanos* coined the phrase "continuous surface connection" stating that the term means that "there is no clear demarcation between 'waters' and wetlands." *Id.* at 2226. Here, there is a very clear demarcation between the Site and Priest Lake. This clear demarcation is evidenced by the distance between the Site and Priest Lake, the roadway that separates these features, and the fact there is no hydrological connection between the Site and Priest Lake. In the post-*Rapanos* guidance, we understood that the EPA acknowledged the plurality's interpretation by effectively equating the term

"continuous surface connection" with the term "directly abut."

For a wetland to directly abut the RPW, the wetland must border or be immediately adjacent to the RPW and not be separated by a berm, dike, or similar feature. Even if a man-made ditch or culvert would connect the Site during certain higher flow periods, this does not make the Site directly abut a RPW. Thus, under any reasonable interpretation of the post-*Rapanos* guidance, the Site does not directly abut a RPW and therefore it cannot be categorically within federal jurisdiction. Rather, the Site must be reviewed under the significant nexus test outlined by Justice Kennedy. There has been no demonstration or explanation on how the Site has any significant nexus to a TNW. Effectively, EPA appears to rely solely on the fact that the Site may be remotely hydrologically connected to the TNWs during limited times of the year. Justice Kennedy rejected the notion that a mere hydrological connection establishes a significant nexus. *Id.* at 2247-49. Here, EPA failed to establish any facts to support a finding of significant nexus.

The Sacketts contest any jurisdictional assertion of a wetland and reasonableness of the Order made by the EPA. They regard the findings as tentative and non-binding (and insufficient to be the basis for any penalty or other adverse action), and request a hearing. Finally, we assume based upon the case of *Tennessee Valley Authority v. Whitman*, 336 F. 3d 1236 (11th Cir. 2003) that the Sacketts are free to ignore the Administrative Compliance Order without the risk of the imposition of penalties for noncompliance with its terms. If you disagree with this assessment, please advise.

Request is hereby made, pursuant to the Freedom of Information Act (FOIA) for the entire Administrative file related to this matter.

Sincerely,

WITHERSPOON, KELLEY,
DAVENPORT & TOOLE, P.S.

By /s/ Leslie R. Weatherhead
Leslie R. Weatherhead

cc: Client
Larry F. Gottesman
National FOIA Officer
Mail Code 2822T
1200 Pennsylvania Ave NW
Washington, D.C. 20460
Telephone number (202) 566-1667
Fax number (202) 566-2147
E-maid address: hg.foia@epamail.epa.gov

Attachment C

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION 10
IDAHO OPERATIONS OFFICE
1435 N. Orchard St.
Boise, Idaho 83706

April 4, 2008

Chantell and Michael Sackett
P.O. Box 425
Nordman, ID 83848-0368

Re: ***In the Matter of Chantell and Michael Sackett***
Administrative Compliance Order, EPA Docket No. CWA-10-2008-0014

Dear Mr. and Mrs. Sackett:

This is in further regard to the administrative compliance order ("Compliance Order") issued to you by the U. S. Environmental Protection Agency (EPA) dated November 26, 2007. The Compliance Order requires you to perform specified restoration activities including, but not limited to, removal of the unauthorized fill and restoration of the site. The specific elements are detailed in the Scope of Work for a Restoration Work Plan which is attached to and incorporated into the Compliance Order. Deadline for removal of the fill and replacement of the wetland soil

is April 15, 2008, deadline for re-planting of the site is April 30, 2008.

EPA is aware that the site is still covered by a substantial amount of snow, thereby making the fill removal and re-planting not feasible at this time. Therefore, EPA is extending the deadline for removal of the fill and replacement of the wetland soil to May 15, 2008 and the deadline for re-planting of the site to May 30, 2008. These revisions change Section 2.2 and Section 2.6 of the Compliance Order and Section II.1., Section II.7., and Section VI.1. of the Scope of Work for a Restoration Work Plan. The complete revised schedule is as follows:

Action	Commence-ment No Later Than	Completion No Later Than
Fill shall be removed and wetland soil returned	May 1, 2008	May 15, 2008[1]
EPA or its representative conducts an inspection of Site	As soon as possible after notification	Prior to planting

[1] At least 48 hours prior to commencing removal activity on the Site, Respondents shall provide verbal notification to the EPA representative identified in Paragraph 2.12 of the Order. Within 7 days of completion of the earthmoving work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 of the Order. The written notification shall include photographs of Site conditions prior to and following earthmoving activities.

Action	Commence-ment No Later Than	Completion No Later Than
Re-Planting of the entire Site	May 15, 2008	May 30, 2008[2]
Monitoring of the entire Site	October 1, 2008	October 31, 2008
Monitoring of the entire Site	June 1, 2009	June 31, 2009
Monitoring of the entire Site	October 1, 2009	October 31, 2009
Monitoring of the entire Site	October 1, 2010	October 31, 2010

If you should have any technical questions regarding the restoration effort, please feel free to contact me at 208-378-5756. For other questions concerning this matter, please contact Ankur Tohan with the EPA Office of Regional Counsel at 206-553-1796.

---

[2] Within 7 days of completion of re-planting work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 of the Order. The written notification shall include photographs of Site conditions prior to and following re-planting.

Thank you for your cooperation in this matter.

Sincerely,

/s/ John M. Olson
John M. Olson
Wetland Ecologist

cc: Ankur Tohan, EPA ORC-158
Barbara Benge, Corps of Engineers, Walla Walla

Mr. Leslie R. Weatherhead
Witherspoon, Kelley, Davenport & Toole
608 Northwest Boulevard, Suite 401
Coeur d'Alene, ID 83814-2146

Attachment D

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101-3140

April 11, 2008

SENT CERTIFIED MAIL RETURN RECEIPT REQUESTED

Leslie Weatherhead
Witherspoon, Kelley, Davenport & Toole PC
422 W. Riverside Ave., Ste. 1100
Spokane, WA 99201

Re: ***In the Matter of Chantell and Michael Sackett***
Administrative Compliance Order,
EPA Docket No. CWA-10-2008-0014

Dear Mr. Weatherhead:

I am the Assistant Regional Counsel assigned to the above mentioned matter. John Olson forward to me a copy of your letter dated April 1, 2008. The U.S. Environmental Protection Agency considers the Sackett's activities conducted in wetlands adjacent to Priest Lake to be violations of the Clean Water Act. I am in process of reviewing your letter and evaluating the various authorities available to EPA to enforce compliance with the Compliance Order and/or seek

penalties for the underlying Clean Water Act violations.

I will provide you a more detail response stating EPA's position in the near future. In the interim, do not hesitate to contact me directly at (206) 553-1796 if you have any questions or concerns.

Sincerely,

/s/ Ankur K. Tohan
Ankur K. Tohan
Assistant Regional Counsel

Cc: John Olson, IOO
Rebecca Chu, EPA, ETPA-083

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101-3140

May 1, 2008

SENT VIA CERTIFIED MAIL-
RETURN RECEIPT REQUESTED

Chantell and Michael Sackett
P.O. Box 425
Nordman, ID 83848-0368

Re: ***In the Matter of Chantell and Michael Sackett***
Administrative Compliance Order,
EPA Docket No. CWA-10-2008-0014

Dear Mr. and. Mrs. Sackett:

With this letter, the U.S. Environmental Protection Agency (EPA) is modifying the terms of the administrative compliance order ("Compliance Order") issued to you on November 26, 2007. The Compliance Order requires you to perform specified restoration activities including, but not limited to, removal of unauthorized fill and restoration of the site. Activities under the Compliance Order were modified on April 4, 2008, to account for ground conditions making fill removal and re-planting infeasible. The modified Compliance Order required fill removal to begin on May 1, 2008, and re-planting to be completed on May 30, 2008. The specific elements for all activates in the Compliance Order are detailed in the Scope of

Work for a Restoration Work Plan attached to and incorporated into the Compliance Order.

EPA has learned that snow cover and low temperatures continue to persist in the Priest Lake area. Consequently, ground conditions remain unfavorable for fill removal and re-planting at this time. Therefore, EPA is extending the deadlines for fill removal and replacement of the wetland soil to June 2, 2008, and for re-planting the site to July 1, 2008. These revisions change Section 2.2 and Section 2.6 of the Compliance Order and Section II.1, Section II.7., and Section VI.1. of the Scope of Work for a Restoration Work Plan. The complete revised schedule is as follows:

Action	Commence-ment No Later Than	Completion No Later Than
Fill shall be removed and wetland soil returned	June 2, 2008	June 15, 2008[1]

[1] At least 48 hours prior to commencing removal activity on the Site, Respondents shall provide verbal notification to the EPA representative identified in Paragraph 2.12 of the Order. Within 7 days of completion of the earthmoving work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 of the Order. The written notification shall include photographs of Site conditions prior to and following earthmoving activities.

Action	Commence-ment No Later Than	Completion No Later Than
EPA or its representative conducts an inspection of Site	As soon as possible after notification	Prior to planting
Re-Planting of the entire Site	June 15, 2008	July 1, 2008[2]
Monitoring of the entire Site	October 1, 2008	October 31, 2008
Monitoring of the entire Site	June 1, 2009	June 31, 2009
Monitoring of the entire Site	October 1, 2009	October 31, 2009
Monitoring of the entire Site	October 1, 2010	October 31, 2010

Should you have any questions concerning this matter, please have your attorney contact Mr. Ankur Tohan directly at 206-553-1796.

---

[2] Within 7 days of completion of re-planting work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 of the Order. The written notification shall include photographs of Site conditions prior to and following re-planting.

Thank you for your cooperation.

Sincerely,
/s/ Richard B. Parkin
Richard Parkin
Acting Director,
Office of Ecosystems,
Tribal, and Public Affairs

cc: John Olson (IOO)
Ankur Tohan (ORC)
H. Reed Hopper
Damien Schiff
Leslie Weatherhead

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101-3140

May 15, 2008

SENT VIA CERTIFIED MAIL-
RETURN RECEIPT REQUESTED

Chantell and Michael Sackett
P.O. Box 425
Nordman, ID 83848-0368

Re: ***In the Matter of Chantell and Michael Sackett***
Amended Administrative Compliance Order, EPA Docket No. CWA-10-2008-0014

Dear Mr. and Ms. Sackett:

With this letter, the U.S. Environmental Protection Agency (EPA) is issuing an amended administrative compliance order ("Amended Compliance Order") that supersedes and replaces the order issued to you on November 26, 2007. The Amended Compliance Order is issued pursuant Sections 308 and 309(a) of the Clean Water Act, 33 U.S.C. §§ 1318 and 1319(a). EPA is issuing this order in connection with the unauthorized placement of fill material into wetlands at your property located at 1604 Kalispell Bay Road near Kalispell Creek, Bonner County, Idaho ("Site").

It has become apparent that the amended dates for compliance detailed in my letter to you dated May 1, 2008, may not result in successful establishment of re-vegetated wetland species at the Site because of the short growing season in northern Idaho. Please note that this Amended Compliance Order removes the obligation that wetland vegetation be re-planted at the Site by July 1, 2008. In addition, the Amended Compliance Order extends the date for removal of fill material and replacement of original wetland soils to October 31, 2008 (ahead of the winter season when removal of fill material and replacement of wetland soils would be infeasible). Since replanting will not be required in the 2008 growing season, there is no need to require the immediate removal of fill material. This Amended Compliance Order will account for the ecological constraints in northern Idaho and will also remove the need for immediate judicial resolution of EPA's motion to dismiss the complaint (Case No. CV-08-0185-EJL) you filed on April 28, 2008.

Successful compliance with the Amended Compliance Order does not preclude EPA from bringing a formal enforcement action for penalties or further injunctive relief to address the Clean Water Act violations associated with your property located at the Site. Please also be aware that failure to comply with the Amended Compliance order may subject you to civil penalties of up to $32,500 per day for each violation, administrative penalties of up to $11,000 per day for each day during which the violation continues or a civil action in Federal court for injunctive relief, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

Should you have any questions concerning this matter, please have your attorney contact Mr. Ankur Tohan directly at 206-553-1796.

Sincerely,

/s/ Richard B. Parkin
Richard Parkin, Acting Director,
Office of Ecosystems, Tribal, and
Public Affairs

cc: H. Reed Hopper, Pacific Legal Foundation
Damien Schiff, Pacific Legal Foundation
Leslie Weatherhead, Witherspoon, Kelley,
Davenport & Toole
Greg Taylor, ID Dept. of Water Resources
Beth Reinhart, U.S. Army Corps of Engineers

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101

In the Matter of:	)
	) DOCKET NO.
CHANTELL AND	) CWA-10-2008-0014
MICHAEL SACKETT	)
	) AMENDED COMPLIANCE
Bonner County, Idaho	) ORDER
	)
Respondents.	)
	)

The following FINDINGS AND CONCLUSIONS are made and ORDER issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by sections 308 and 309(a) of the Clean Water Act ("the Act"), 33 U.S.C. §§ 1318 and 1319(a). This authority has been delegated to the Regional Administrator, Region 10, and has been duly redelegated to the undersigned Director of the Office of Ecosystems, Tribal and Public Affairs. This AMENDED COMPLIANCE ORDER ("Order") supersedes and replaces the Compliance Order issued under Docket Number CWA-10-2008-0014 to Respondents on November 26, 2007.

I. FINDINGS AND CONCLUSIONS

1.1 Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into

waters of the United States by any person, except as authorized by a permit issued pursuant to section 402 or 404 of the Act, 33 U.S.C. §§ 1342 or 1344. The unpermitted discharge of any pollutant from a point source constitutes a violation of section 301(a) of the Act, 33 U.S.C. § 1311(a). Section 502(12), 33 U.S.C. § 1362(12), defines the term "discharge of any pollutant" to include "any addition of any pollutant to navigable waters from any point source." "Navigable waters" are defined as "waters of the United States." 33 U.S.C. § 1362(7).

1.2 Respondents Chantell and Michael Sackett (hereinafter collectively "Respondents") are "persons" within the meaning of Sections 301(a) and 502(5) of the Act, 33 U.S.C. §§ 1311(a) and 1362(5).

1.3 Respondents own, possess, or control real property identified as 1604 Kalispell Bay Road near Kalispell Creek, Bonner County, Idaho; and located within Section 12, Township 60 North, Range 5 West, Boise Meridian ("Site"). The Site is adjacent to Priest Lake, and bounded by Kalispell Bay Road on the north and Old Schneider Road on the south.

1.4 The Site contains wetlands within the meaning of 40 C.F.R. § 230.3(t) and 33 C.F.R. § 328.3(b); and the wetlands meet the criteria for jurisdictional wetlands in the 1987 "Federal Manual for Identifying and Delineating Jurisdictional Wetlands."

1.5 The Site's wetlands are adjacent to Priest Lake within the meaning of 40 C.F.R. § 230.3(s)(7) and 33 C.F.R. § 328.3(a)(7). Priest Lake is a "navigable water" within the meaning of section 502(7) of the Act,

33 U.S.C. § 1362(7), and "waters of the United States" within the meaning of 40 C.F.R. § 232.2.

1.6 In April and May, 2007, at times more fully known to Respondents, Respondents and/or persons acting on their behalf discharged fill material into wetlands at the Site. Respondents filled approximately one half acre.

1.7 Upon information and belief, Respondents and/or persons acting on their behalf used heavy equipment to place the fill material into the wetlands. The heavy equipment used to fill these waters is a "point source" within the meaning of section 502(14) of the Act, 33 U.S.C. § 1362(14).

1.8 The fill material that Respondents and/or persons acting on their behalf caused to be discharged included, among other things, dirt and rock, each of which constitutes a "pollutant" within the meaning of section 502(6) of the Act, 33 U.S.C. § 1362(6).

1.9 By causing such fill material to enter waters of the United States, Respondents have engaged, and are continuing to engage, in the "discharge of pollutants" from a point source within the meaning of sections 301 and 502(12) of the Act, 33 U.S.C. §§ 1311 and 1362(12).

1.10 Respondents' discharges of dredged and/or fill material was not authorized by any permit issued pursuant to section 402 or 404 of the Act, 33 U.S.C. §§ 1312 or 1314.

1.11 Respondents discharge of pollutants into waters of the United States at the Site without a permit constitutes a violation of section 301 of the Act, 33 U.S.C. § 1311.

1.12 As of the effective date of this Order, the fill material referenced in Paragraph 1.6 above remains in place.

1.13 Each day the fill material remains in place without the required permit constitutes an additional day of violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

1.14 Taking into account the seriousness of this violation and Respondents' good faith efforts to comply with applicable requirements, the schedule for compliance contained in the following Order is reasonable and appropriate.

II. ORDER

Based upon the foregoing FINDINGS AND CONCLUSIONS and pursuant to sections 308 and 309(a) of the Clean Water Act, 33 U.S.C. §§ 1318 and 1319(a), it is hereby ORDERED as follows:

2.1 In compliance with the Clean Water Act, Respondents shall remove all unauthorized fill material placed within wetlands located at Section 12, Township 60 North, Range 5 West, Boise Meridian ("Site"). The removed fill material is to be moved to a location approved by the EPA representative identified in Paragraph 2.8. To the maximum extent practicable, the Site shall be restored to its original, pre-disturbance topographic condition with the original wetlands soils that were previously removed from the Site. Acceptable reference topographic conditions exist on wetlands immediately adjacent to and bordering the Site.

2.2 Compliance activities described under Paragraph 2.1 must be completed no later than **October 31, 2008**.

2.3 At least 48 hours prior to commencing compliance activity on the Site, Respondents shall provide verbal notification to the EPA representative identified in Paragraph 2.8.

2.4 Within 7 days of completion of the compliance activities under Paragraph 2.1, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.8. The written notification shall include photographs of Site conditions prior to and following compliance with this Order.

2.5 Upon receipt of the notification referenced under Paragraph 2.4, EPA may schedule an inspection of the Site by EPA or its designated representative.

2.6 Respondents shall provide and/or obtain access to the Site and any off-Site areas to which access is necessary to implement this Order; and shall provide access to all records and documentation related to the conditions at the Site and the restoration activities conducted pursuant to this Order. Such access shall be provided to EPA employees and/or their designated representatives, who shall be permitted to move freely at the site and appropriate off-site areas in order to conduct actions that EPA determines to be necessary.

2.7 EPA encourages Respondents to engage in informal discussion of the terms and requirements of this Order. Such discussions should address any questions Respondents have concerning compliance with this Order. In addition, Respondents are

encouraged to discuss any allegations herein which Respondents believe to be inaccurate or requirements which may not be attainable and the reasons why. Alternative methods to attain the objectives of this Order may be proposed. If acceptable to EPA, such proposals may be incorporated into amendments to this Order at EPA's discretion. After compliance with the requirements of this Order, Respondents are also encouraged to contact the EPA representative identified in Paragraph 2.8 to discuss restoration of the Site to its pre-disturbance, vegetative condition.

2.8 All submissions and notifications required by this Order shall be sent to:

John Olson
U.S. EPA, Idaho Operations Office
1435 North Orchard Street
Boise, ID 83706
Phone: (208) 378-5756
Fax: (208) 378-5744

2.9 Prior to the completion of the terms of this Order, Respondents shall provide any successor in ownership, control, operation, or any other interest in all or part of the Site, a copy of this Order at least 30 days prior to the transfer of such interest. In addition, Respondents shall simultaneously notify the EPA representative identified in Paragraph 2.8 in writing that the notice required in this Section was given. No real estate transfer or real estate contract shall in any way affect Respondent's obligation to comply fully with the terms of this Order.

2.10 This Order shall become effective on the date it is signed.

III. SANCTIONS

3.1 Notice is hereby given that violation of, or failure to comply with, the foregoing Order may subject Respondents to (1) civil penalties of up to $32,500 per day of violation pursuant to section 309(d) of the Act, 33 U.S.C. § 1319(d), and 40 C.F.R. Part 19; (2) administrative penalties of up to $11,000 per day for each violation, pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g), and 40 C.F.R. Part 19; or (3) civil action in federal court for injunctive relief, pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b).

3.2. Nothing in this Order shall be construed to relieve Respondents of any applicable requirements of federal, state, or local law. EPA reserves the right to take enforcement action as authorized by law for any violation of this Order, and for any future or past violation of any permit issued pursuant to the Act or of any other applicable legal requirements, including, but not limited to, the violations identified in Part I of this Order.

Dated this 15th day of May, 2008

/s/ Richard B. Parkin
RICHARD PARKIN, Acting Director
Office of Ecosystems, Tribal and Public Affairs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO,
NORTHERN DIVISION

Filed Aug. 7, 2008

CHANTELL and MICHAEL SACKETT, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; and STEPHEN L. JOHNSON, in his official capacity as Administrator of the Environmental Protection Agency, Defendants.	)	Case No. 08-cv-185-N-EJL **JUDGMENT**

Based upon this Court's Memorandum Order, entered herewith, and being fully advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs take nothing from the Defendants and this matter is **DISMISSED IN ITS ENTIRETY**.

DATED: **August 7, 2008**

/s/ Edward J. Lodge
Honorable Edward J. Lodge
U.S. District Judge

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

SEP 13 2011

No. 10-1062

In the

Supreme Court of the United States

CHANTELL SACKETT and MICHAEL SACKETT,
Petitioners,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
and LISA P. JACKSON, Administrator,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITIONERS' BRIEF ON THE MERITS

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Counsel for Petitioners

Library of Congress
Law Library

QUESTIONS PRESENTED

1. May Petitioners seek pre-enforcement judicial review of the Administrative Compliance Order pursuant to the Administrative Procedure Act, 5 U.S.C. § 704?

2. If not, does Petitioners' inability to seek pre-enforcement judicial review of the Administrative Compliance Order violate their rights under the Due Process Clause?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 14

ARGUMENT 17

I. THE CLEAN WATER ACT COMPLIANCE ORDER ISSUED AGAINST THE SACKETTS VIOLATES THEIR DUE PROCESS RIGHTS 17

A. The Compliance Order Has Deprived the Sacketts of Protected Interests 17

B. The Sacketts Have Not Been Afforded Meaningful Review of the Compliance Order 19

C. The Modes of Review That the Ninth Circuit Concluded Constitute Meaningful Review of the Compliance Order Are Either Not Meaningful or Are Nonexistent 23

1. A Clean Water Act Enforcement Action Does Not Provide Meaningful Review of a Compliance Order 23

TABLE OF CONTENTS—Continued

Page

2. Neither the Clean Water Act's Allowance for Good Faith in Assessing Civil Penalties Nor the Act's Permitting Process Provide Meaningful Review of Compliance Orders 29

II. CONGRESS DID NOT INTEND TO FORECLOSE MEANINGFUL AND CONSTITUTIONALLY ADEQUATE REVIEW OF THE COMPLIANCE ORDER UNDER THE ADMINISTRATIVE PROCEDURE ACT . . . 32

A. Congress Intended to Allow Review of Compliance Orders Under the Administrative Procedure Act 33

1. Judicial Review of Agency Action Is Presumed 33

2. A Congressional Intent to Preclude Judicial Review Under the Administrative Procedure Act Must Be "Fairly Discernible" from the Statute 34

3. Judicial Review of the Compliance Order Under the Administrative Procedure Act Is Consistent With the Clean Water Act 35

TABLE OF CONTENTS—Continued

Page

a. The Absence of Meaningful Judicial Review of Compliance Orders Under the Clean Water Act Strongly Supports Judicial Review Under the Administrative Procedure Act . . 35

b. The Nature of the Compliance Order Supports Judicial Review Under the Administrative Procedure Act 39

c. The Clean Water Act's Structure and Enforcement Scheme Are Consistent with Judicial Review of Compliance Orders Under the Administrative Procedure Act . . 42

d. The Clean Water Act's Objectives Support Review Under the Administrative Procedure Act 45

i. EPA's Prosecutorial Discretion 46

ii. EPA's Ability to Respond Quickly to Environmental Hazards 46

iii. Judicial and Administrative Workloads . . 47

TABLE OF CONTENTS—Continued

Page

e. The Clean Water Act's Legislative History Is Consistent With Judicial Review Under the Administrative Procedure Act 49

4. The Ninth Circuit's Interpretation of the Clean Water Act Is Fundamentally Flawed 50

B. The Avoidance Canon Confirms That the Clean Water Act Should Be Read to Preserve the Sacketts' Due Process Rights and Meaningful Judicial Review 53

III. THE COMPLIANCE ORDER CONSTITUTES FINAL AGENCY ACTION 54

CONCLUSION 56

TABLE OF AUTHORITIES

Page

Cases

Abbott Labs. v. Gardner,
387 U.S. 136 (1967) 33-34, 42, 47-48

Alaska Department of Environmental Conservation v. EPA,
540 U.S. 461 (2004) ..... passim

Am. Petroleum Inst. v. EPA,
906 F.2d 729 (D.C. Cir. 1990) 55

Armstrong v. Manzo, 380 U.S. 545 (1965) 10, 17

Arnett v. Kennedy, 416 U.S. 134 (1974) 24

Ass'n of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970) 33

Baldwin v. Hale,
68 U.S. (1 Wall.) 223 (1864) 17

Barlow v. Collins, 397 U.S. 159 (1970) 42

Barry v. Barchi, 443 U.S. 55 (1979) 20-24, 48

Bennett v. Spear, 520 U.S. 154 (1997) 54

Block v. Community Nutrition Institute,
467 U.S. 340 (1984) ..... passim

Bowen v. Michigan Academy of Family Physicians,
476 U.S. 667 (1986) 34-35, 42, 49

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 51

Cleveland Bd. of Educ. v. Loudermill,
470 U.S. 532 (1985) 22

TABLE OF AUTHORITIES—Continued

Page

Connecticut v. Doehr, 501 U.S. 1 (1991) 19, 28

Crowell v. Benson, 285 U.S. 22 (1932) 52

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 53

Ex parte Young, 209 U.S. 123 (1908) 15, 24-25, 36

Federal Deposit Ins. Corp. v. Mallen, 486 U.S. 230 (1988) 20, 22, 24

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) 35-37

Fuentes v. Shevin, 407 U.S. 67 (1972) 17, 20, 22

Gilbert v. Homar, 520 U.S. 924 (1997) 24

Hoffman Group, Inc. v. EPA, 902 F.2d 567 (7th Cir. 1990) 12

Hooper v. California, 155 U.S. 648 (1895) 53

Laguna Gatuna, Inc. v. Browner, 58 F.3d 564 (10th Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996) 12

Leedom v. Kyne, 358 U.S. 184 (1958) 35

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) 18, 21

Lloyd A. Fry Roofing Co. v. U.S. EPA, 554 F.2d 885 (8th Cir. 1977) 49

Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) 21

TABLE OF AUTHORITIES—Continued

Page

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Mathews v. Eldridge, 424 U.S. 319 (1976) 22

McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479 (1991) 35-37, 45

Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) 20, 22, 24

Morris v. Gressette, 432 U.S. 491 (1977) 40

Nat'l Labor Relations Bd. v. Un. Food & Comm. Workers Union, 484 U.S. 112 (1987) 34, 43

New York v. Burger, 482 U.S. 691 (1987) 18

Rapanos v. United States Army Corps of Eng'rs, 547 U.S. 715 (2006) 5, 30

S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) 45

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Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1 (2000) 28, 36-38, 43

TABLE OF AUTHORITIES—Continued

Page

Sniadach v. Family Fin. Corp.,
395 U.S. 337 (1969) 17, 19

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531 U.S. 159 (2001) 5, 50

Tennessee Valley Authority v. Whitman,
336 F.3d 1236 (11th Cir. 2003) 12, 18, 22, 56

Thunder Basin Coal Co. v. Martin,
969 F.2d 970 (10th Cir. 1992) 27

Thunder Basin Coal Co. v. Reich,
510 U.S. 200 (1994) ..... passim

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406 U.S. 311 (1972) 18

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456 U.S. 201 (1982) 44

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Wachovia Bank, N.A. v. Schmidt,
546 U.S. 303 (2006) 50

Constitution

U.S. Const. amend. V 2

Statutes

5 U.S.C. § 551(6) 52

§ 558(b) 11, 39, 51

§ 701(a)(1) 3

TABLE OF AUTHORITIES—Continued

Page

§ 702 33

§ 704 ..... 3, 54, 56

§ 706(2)(A) 10

§§ 701-706 9

28 U.S.C. § 1254(1) 1

§ 2461 note, *as amended*,
31 U.S.C. § 3701 note 8

30 U.S.C. § 801, *et seq.* 26

§ 813 26

§ 815 28

§ 816 ..... 28, 38

§ 816(a)(1) 44

§ 818(a) 44

§ 819 26

§ 820(j) 44

33 U.S.C. § 407 49

§ 1251 45

§ 1311(a) 2

§ 1319(a)-(b) 42

§ 1319(a)(3) 2-3, 6, 22, 42

§ 1319(b) 23, 42, 44

§ 1319(c) 42

TABLE OF AUTHORITIES—Continued

Page

§ 1319(d) 3, 8-9, 29, 41-42, 51

§ 1319(g) 42

§ 1319(g)(1) 42

§ 1344(c) 5

§ 1362(12)(A) 2

§ 1362(6) 4

§ 1362(7) 2, 4

§ 1362(14) 4

§ 1364 . . . . . 42, 46

42 U.S.C. § 7401, *et seq.* 41

§ 7603 41

§ 7607(b) 56

§ 9613(h) 47

§§ 9601-9628 47

Regulations

30 C.F.R. § 40.4 (1994) 26

33 C.F.R. § 326.3(e)(1)(ii) (2011) 30

§ 328.3(a)(7) (2011) 4

40 C.F.R. § 230.3(s)(7) (2011) 4

Rule

Fed. R. App. P. 35(f) 1

TABLE OF AUTHORITIES—Continued

Page

Miscellaneous

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TABLE OF AUTHORITIES—Continued

Page

P.L. 99-499, 100 Stat. 1647 (Oct. 17, 1986) 47

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OPINIONS BELOW

The panel opinion of the Court of Appeals is published at 622 F.3d 1139 (9th Cir. 2010), and is included in Petitioners' Appendix to the Petition for Writ of Certiorari (Pet. Cert. App.) at A. The panel opinion denying the petition for rehearing en banc is not published but is included in Pet. Cert. App. at D. The opinion of the district court granting the motion of Respondents United States Environmental Protection Agency, *et al.* (EPA), to dismiss under Federal Rule of Civil Procedure 12(b)(1), is not published but is included in Pet. Cert. App. at C.

JURISDICTION

On August 7, 2008, the district court granted EPA's motion to dismiss the action of Petitioners Michael and Chantell Sackett and entered judgment in favor of EPA. The Sacketts filed a timely appeal to the Ninth Circuit Court of Appeals. On September 17, 2010, a panel of the Court of Appeals affirmed the district court's dismissal. The Sacketts then filed a timely petition for rehearing *en banc*. On November 29, 2010, the panel denied the petition, no judge of the Court of Appeals having requested a vote. *See* Fed. R. App. P. 35(f). On February 23, 2011, the Sacketts filed a timely petition for certiorari. On June 28, 2011, this Court granted the petition for writ of certiorari. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. V.

The Clean Water Act provides in pertinent part:

> Except as in compliance with this section and sections [1312, 1316, 1317, 1328, 1342, and 1344 of this title], the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a).

The term "discharge of a pollutant" and the term "discharge of pollutants" each means

> (A) any addition of any pollutant to navigable waters from any point source.

33 U.S.C. § 1362(12)(A).

> The term "navigable waters" means the waters of the United States, including the territorial seas.

33 U.S.C. § 1362(7).

> Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section [1311 of this title], . . . he shall issue an order requiring such person to comply with such section or requirement, or

> he shall bring a civil action in accordance with subsection (b) of this section.

33 U.S.C. § 1319(a)(3).

> Any person who violates . . . any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

33 U.S.C. § 1319(d).

> (a) This chapter [5 U.S.C. §§ 701, *et seq.*] applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review . . . .

5 U.S.C. § 701(a)(1).

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

5 U.S.C. § 704.

STATEMENT OF THE CASE

The Clean Water Act casts a nationwide regulatory net that snags individual citizens doing ordinary, everyday activities. Unlike other environmental statutes, the Clean Water Act is not directed toward a certain field of activity where those involved would be expected to know the applicable regulations. Any citizen engaged in a range of activities may run afoul of the Act. The Clean Water Act's reach is extremely broad, requiring a permit for the discharge of "pollutants"[1] from a "point source"[2] into the "waters of the United States,"[3] which phrase has been interpreted by regulation to include "wetlands."[4] Wetlands are themselves defined by complex criteria—including soil type, vegetation, and hydrology[5]—which defy consistent application and are not apparent to the average citizen. The government finds regulable "wetlands" even on land that appears to be totally dry. As testament to the difficulty of determining federal jurisdiction over "wetlands" and other waters, in just the last decade, this Court has

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[1] A "pollutant" is defined as, among other things, "dredged spoil, . . . rock, sand, [and] cellar dirt." 33 U.S.C. § 1362(6).

[2] A "point source" is defined as "any discernible, confined and discrete conveyance." *Id.* § 1362(14).

[3] *Id.* § 1362(7).

[4] *See* 40 C.F.R. § 230.3(s)(7) (2011); 33 C.F.R. § 328.3(a)(7) (2011).

[5] *See generally* U.S. Army Corps of Engineers, Wetlands Delineation Manual 9-10 (Jan. 1987), *available at* http://el.erdc.usace.army.mil/wetlands/pdfs/wlman87.pdf (last visited Sept. 15, 2011).

twice ruled that EPA and the United States Army Corps of Engineers[6] have overextended their reach under the Clean Water Act. *See Rapanos v. United States Army Corps of Eng'rs*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001). It is no surprise then that average citizens may not, and sometimes cannot, know whether they have regulable "wetlands" on their property and that jurisdictional disputes arise.[7]

To make matters worse, if EPA has completed an analysis and made a determination that the property contains jurisdictional "wetlands," the citizen has no right to judicial review of that analysis. If the citizen hires professionals to conduct a "wetlands" determination, EPA is not obligated to accept it. Despite any evidence, professional opinions, or agency advice the citizen obtains, EPA may still impose sanctions by a compliance order if it has "any

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[6] Although EPA has principal responsibility for administering the Clean Water Act, the Corps administers the Act's permitting process for the discharge of dredged and fill material. Yet even then, EPA retains oversight for the Corps' activities. *See* Memorandum of Agreement Between the Dep't of the Army and the EPA Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act (Jan. 19, 1989) (Guidance), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/enfoma.cfm (last visited Sept. 15, 2011). *See also* 33 U.S.C. § 1344(c) (authorizing EPA to veto certain Corps-approved discharges).

[7] *See* Mark Latham, Rapanos v. United States: *Significant Nexus or Significant Confusion? The Failure of the Supreme Court to Clearly Define the Scope of Federal Wetland Jurisdiction*, *in The Supreme Court and the Clean Water Act: Five Essays* 5, 6 (2007), *available at* http://www.vjel.org/books/pdf/PUBS10004.pdf (last visited Sept. 15, 2011).

information" that the property contains a jurisdictional "wetland." *Cf.* 33 U.S.C. § 1319(a)(3).

Petitioners Michael and Chantell Sackett are individual citizens unwittingly ensnared in this regulatory net. They own a small (0.63 acre) lot near Priest Lake, Idaho, on which they intend to build their family home. Pet. Cert. App. A-2. The lot is within an existing built-out subdivision and is zoned for residential use. *See id.* E-2. There are roads on two sides of the lot and residential lots on the other two sides. Between the lot and the lake are a road as well as other lots on which homes have been built. *See id.* E-2 - E-3; J.A. 10. Prior to purchasing the lot, the Sacketts completed the normal due diligence, including inspecting the property and researching permitting history and regulatory requirements. The Sacketts had obtained no information that gave them any reason to believe that their property contained "wetlands" regulated under the Clean Water Act. They obtained all required local permits and began to build their new home when they were issued an EPA compliance order. *See id.*

The Sacketts were devastated when they received the compliance order. The order charges them with violating the Clean Water Act by placing fill material on their lot. *See* J.A. 20 ("Respondents discharge of pollutants into waters of the United States at the Site without a permit constitutes a violation of section 301 of the Act . . . ."). It suggests that EPA has adjudicated the charge and as a result has imposed serious and costly sanctions on them. *See id.* at 23-24 ("Notice is hereby given that violation of, or failure to comply with, the foregoing Order may subject Respondents to . . . civil penalties . . . or . . . civil action in federal

court . . . ."). The order contains both prohibitive and mandatory features. First, the order enjoins them from the only authorized use of the property under local law. *See id.* at 21 (directing the Sacketts to "immediately undertake activities to restore the Site" and requiring that the "[f]ill shall be removed and wetland soil returned"). The order, as subsequently amended, requires them, at their own expense, to "remove all unauthorized fill material" and move it to "a location approved by [an] EPA representative," Pet. Cert. App. G-4, as well as to prepare for EPA "photographs of [s]ite conditions prior to and following compliance" with the order. *Id.* G-5. The order revokes their fundamental right to exclude others from their property, requiring them (1) to allow EPA to conduct "an inspection of the Site," (2) to grant "access to the Site and any off-Site areas to which access is necessary to implement" the order, (3) to allow EPA officials "to move freely at the site," and (4) to allow EPA officials to engage in any "actions that EPA determines to be necessary" on the site. *Id.* Given that the order is not based on probable cause, it withdraws the Sacketts' constitutional right to be free of unreasonable searches by requiring them to grant access to "all records and documentation related to the conditions at the [s]ite and the restoration activities conducted pursuant to this [o]rder." *Id.*

Even after completion of the fill removal, the compliance order continues to control the use of the Sacketts' property. As originally crafted, the order required that: (1) the "entire [s]ite shall be planted with container stock of native scrub-shrub, broad-leaved deciduous wetland plants and seeded with native herbaceous wetland plants"; (2) "[t]rees and tall shrub species shall be planted approximately 10 feet

apart on center over the entire Site"; (3) "[f]ast growing, native perennial woody species common to wetland areas of northern Idaho shall be incorporated into the plantings"; (4) the "[s]ite shall be fenced for the first three growing seasons"; and (5) "[m]onitoring of vegetation on the restored [s]ite for survival and ground coverage shall be performed in October 2008, June 2009, October 2009, and October 2010." J.A. 26-28. Following several amendments made after the filing of the Sacketts' lawsuit, the order now requires that the Sacketts restore the site "to its original, pre-disturbance topographic condition with the original wetlands soils that were previously removed from the Site." Pet. Cert. App. G-4. The very existence of the order, subjecting the property to a federal mandate, prohibiting the intended, authorized use, and requiring expensive remedial actions, substantially reduces the value of the property and limits the Sacketts' ability to alienate it. As if to ensure this deprivation of their property interest, the compliance order requires the Sacketts to provide a copy of the order to anyone interested in the property "at least 30 days prior to the transfer of such interest." *Id.* G-6.

Although there has been no judicial decision to establish EPA's jurisdiction and authority to impose these deprivations, the compliance order threatens the Sacketts with various "SANCTIONS," Pet. Cert. App. G-7, including civil penalties of up to $37,500 per day if they do not comply with the order.[8] Further,

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[8] The Clean Water Act provides that civil penalties cannot exceed $25,000 per day. *See* 33 U.S.C. § 1319(d). Congress, however, has authorized EPA to increase that amount to reflect the effects of inflation. *See* 28 U.S.C. § 2461 note, *as amended*, 31 U.S.C. § 3701 note. At the time the amended compliance order

(continued...)

although violation of a compliance order does not itself incur criminal penalties, the order puts the Sacketts on notice that EPA believes that their property contains jurisdictional wetlands; and such notice can often be the moving factor in convincing the Department of Justice to bring a criminal action.[9] The order imposes these dire consequences based on "any information" that the Sacketts' activity may be a violation of the Clean Water Act. *See* 33 U.S.C. § 1319(d).

Believing that their property was not a "wetland" within EPA's jurisdiction, the Sacketts attempted to resolve the compliance order informally, but EPA refused to address the Sacketts' jurisdictional arguments. Pet. Cert. App. A-3. Therefore, in April, 2008, the Sacketts filed suit to contest the jurisdictional bases for the order. The Sacketts' complaint asserts three claims.

The first claim alleges that EPA does not have jurisdiction over the property, and that as a consequence the compliance order should be set aside under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. *See* J.A. 13. The APA authorizes a

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[8] (...continued)
was issued against the Sacketts, EPA had augmented the civil penalty amount, pursuant to this authority, to $32,500 per day. *See* Pet. Cert. App. G-7. But effective January 12, 2009, EPA increased the penalty again to $37,500. *See* 74 Fed. Reg. 626, 627 (Jan. 7, 2009). Therefore, as stated in the text, the Sacketts today stand liable for up to $37,500 per day in civil penalties for failing to comply with the compliance order.

[9] *See* U.S. EPA, Guidance on Choosing Among Clean Water Act Administrative, Civil and Criminal Enforcement Remedies, at 4-5 (Aug. 28, 1987), *available at* http://www.epa.gov/compliance/resources/policies/civil/cwa/cwacivcriminenfremed-mem.pdf (last visited Sept. 15, 2011).

reviewing court to set aside final agency action that is, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

The second and third claims assert that the compliance order violates the Sacketts' due process rights. J.A. 13-14. The second claim turns on the basic principle that, before a person can be deprived of liberty or property, he is entitled to a full and fair hearing "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The third claim is based on the related principle that a person cannot be punished for conduct that violates an "impermissibly vague" law. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982).

Shortly after the complaint's filing and the issuance of the existing amended compliance order, EPA moved to dismiss the Sacketts' action. EPA contended that the order is not subject to judicial review under the APA, and that it does not violate due process. In a memorandum decision issued August 7, 2008, the district court granted EPA's motion to dismiss, holding that it lacked jurisdiction to adjudicate the Sacketts' APA and due process claims. *See* Pet. Cert. App. C. In an order issued October 9, 2008, the district court denied the Sacketts' motion for clarification and reconsideration, concluding that its dismissal order did not need clarification and that the Sacketts had not stated an adequate basis for reconsideration. *See* J.A. 2.

The Sacketts then appealed to the Ninth Circuit Court of Appeals. In a decision issued September 17,

2010, the court affirmed the district court's dismissal. *See* Pet. Cert. App. A.

The Ninth Circuit's decision comprises a three-part analysis. In the initial part, the court created a constitutional problem by reading the Clean Water Act to preclude judicial review of the compliance order. The court acknowledged both that the Clean Water Act's express language does not mandate the interpretation it ultimately adopted, Pet. Cert. App. A-6, and that courts should avoid statutory interpretations that raise serious constitutional questions. Nevertheless, the Ninth Circuit strove to support its interpretation by relying on just three of the factors set forth in *Block v. Community Nutrition Institute*, 467 U.S. 340, 351 (1984), for determining whether Congress intends to preclude judicial review under the APA. The factors that the Ninth Circuit used were the Clean Water Act's purported statutory structure, purposes, and legislative history. *See* Pet. Cert. App. A-6 - A-9.

But in relying on these factors, the court never considered whether contrary inferences might support the conclusion that Congress *did* intend for individuals like the Sacketts to obtain review under the APA. Similarly, the court never considered whether the nature of the compliance order itself (one of the *Block* factors that the Ninth Circuit left unaddressed) supports review under the APA. The court's failure to assess the factor dealing with the "nature of the administrative action" is significant, given that the APA forbids the imposition of sanctions unless an agency acts within its statutory jurisdiction and authority, *see* 5 U.S.C. § 558(b), two considerations naturally inviting judicial review.

The Ninth Circuit also sought support for its interpretation from other courts that have held that the Clean Water Act precludes review of purportedly "pre-enforcement" actions, such as compliance orders,[10] Pet. Cert. App. A-6, even though these cases ignored, or addressed only cursorily, the due process implications of denying judicial review to individuals like the Sacketts.

Later, the Ninth Circuit attempted to resolve the constitutional quandary it created by its narrow reading of the Clean Water Act. The court acknowledged that the Sacketts have a due process right to meaningful judicial review of the compliance order at a meaningful time, and that the Act's failure to provide such review could in theory be unconstitutional. The court also acknowledged that the Clean Water Act, read literally, authorizes civil liability for violations of compliance orders, regardless of whether the Act itself has been violated. And, the court acknowledged that this reading of the Act (adopted by the Eleventh Circuit in *Tennessee Valley Authority (TVA) v. Whitman*, 336 F.3d 1236 (11th Cir. 2003), for an analogous provision of the Clean Air Act) would mean that the Sacketts' compliance order is unconstitutional if it is not subject to judicial review. *See* Pet. Cert. App. A-10 - A-11. But the court rejected a literal interpretation of the Clean Water Act's text, instead holding that, if and when EPA chooses to enforce the compliance order in federal court, the

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[10] *See Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996); *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418 (6th Cir.), *cert. denied*, 513 U.S. 927 (1994); *S. Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir. 1990); *Hoffman Group, Inc. v. EPA*, 902 F.2d 567 (7th Cir. 1990).

Sacketts may then raise a jurisdictional defense. Pet. Cert. App. A-11 - A-12.

In the final part of its analysis, the Ninth Circuit held that delaying judicial review of the Sacketts' compliance order does not create a " 'constitutionally intolerable choice' " of suffering onerous compliance costs or accepting judicial review only at the risk of significant liability. Pet. Cert. App. A-13 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994)). The court based this conclusion on two grounds.

First, the court reasoned that the Sacketts can contest EPA's jurisdiction to issue a compliance order by applying for a permit and seeking judicial review of the permit's denial. Pet. Cert. App. A-13 - A-14. The court, however, did not explain the manner in which the permitting process can provide review of the compliance order, given that (1) review would be limited to the permit denial or contested permit conditions, and (2) the Sacketts are precluded by regulation from even applying for a permit until the compliance order is resolved. Also, the court did not address the Sacketts' contention that, under *Thunder Basin*, the Clean Water Act permitting process is too onerous to provide constitutionally adequate review, because that process is frequently ruinously expensive and time-consuming, and its costs are not recoverable.

Second, the court reasoned that, if and when EPA seeks civil penalties for the Sacketts' failure to comply with the compliance order, the amount of those penalties will be left to the equitable discretion of a federal judge, not EPA. Pet. Cert. App. A-14 - A-15. But the court did not address the fact that even a substantial "good faith" reduction in liability would

still leave the Sacketts paying an immense civil penalty; indeed, a 99% reduction to the statutory maximum for four years of noncompliance would exceed $500,000.

Accordingly, the court concluded that the Clean Water Act precludes APA review, and that such preclusion does not violate the Sacketts' due process rights. Pet. Cert. App. A-15.

SUMMARY OF ARGUMENT

The compliance order violates the Sacketts' due process rights. The order has deprived the Sacketts of their right to the reasonable use and enjoyment of their property, and their right to be free from unreasonable searches and seizures. The order will continue to deprive them of these rights for the indefinite future.

The Sacketts have never been offered any opportunity for meaningful review of the compliance order. EPA has no administrative process the exhaustion of which will produce an action reviewable in court. The Clean Water Act's compliance order enforcement provisions do not provide meaningful review, either. The Sacketts cannot initiate such review, but instead are left to the mercy and whim of EPA, never certain whether or when the agency will bring an enforcement action. Such review is available, if at all, only by ignoring or violating the compliance order and thereby incurring the potential for sanctions of up to $37,500 per day. Even if the Sacketts comply with the order, they still cannot seek judicial review.

This Court's precedents confirm that judicial review that can be obtained only on such terms as EPA offers the Sacketts is constitutionally inadequate.

Under the principle of *Ex parte Young*, 209 U.S. 123 (1908), judicial review is constitutionally inadequate if it can be obtained only by running the risk of significant civil or criminal liability, and if judicial review cannot otherwise be had while complying. That principle applies fully to the Sacketts' predicament: review in an EPA enforcement proceeding can occur (if at all) only through the Sacketts' refusal to comply. There is no process whereby the Sacketts can comply with the order and seek review.

Nothing in *Thunder Basin*, the Court's most recent explication of *Ex parte Young*, is to the contrary. Unlike the parties in *Thunder Basin*, (1) the Sacketts cannot initiate review, (2) the Sacketts have already been subjected to a serious deprivation, (3) the Clean Water Act does not authorize temporary relief from compliance orders or provide any post-issuance process; and (4) the Sacketts cannot comply with the order *and* seek review.

Nevertheless, constitutionally adequate review of the compliance order should be available under the APA. That Act establishes a strong presumption in favor of judicial review of agency action, and there is no competent evidence that Congress intended otherwise. When considered *in pari materia* with the APA, the Clean Water Act can and should be read so as not to preclude judicial review of compliance orders.

Contrary to the decision of the Ninth Circuit, the nature of a Clean Water Act compliance order supports the need for judicial review. Unlike a cease and desist order, a compliance order operates like a mandatory injunction and imposes sanctions for its violation, attributes that are well-fitted for prompt judicial review. Also, the structure and purpose of the Clean

Water Act support an interpretation favoring judicial review. The Clean Water Act contains no "channeling" structure or provision expressly precluding review, and such review would be consistent with the Act's enforcement objectives. Allowing judicial review under the APA would not limit EPA's prosecutorial discretion or its ability to respond quickly to environmental emergencies, but would in fact support EPA's administration by giving both individuals like the Sacketts and the agency an early decision as to whether EPA has authority over a given land-use activity and the Clean Water Act's legislative history provides no support for a contrary view.

Further supporting review is this Court's "avoidance" canon, which counsels courts to avoid statutory interpretations that would create serious constitutional questions. By construing the Clean Water Act to allow review under the APA, the due process violation resulting from the absence of such review can be avoided.

Last, the compliance order constitutes final agency action. It represents the consummation of EPA's decisionmaking process, as there is no further administrative process governing the order; and the order imposes severe sanctions on the Sacketts. The order's finality is confirmed by *Alaska Department of Environmental Conservation (ADEC) v. EPA*, 540 U.S. 461 (2004), in which this Court held that a closely analogous Clean Air Act compliance order was final agency action.

Accordingly, the Sacketts should be allowed to seek judicial review under the APA.

ARGUMENT

I

THE CLEAN WATER ACT COMPLIANCE ORDER ISSUED AGAINST THE SACKETTS VIOLATES THEIR DUE PROCESS RIGHTS

The Sacketts base their due process claims on the facts that (1) EPA has imposed on them severe sanctions that deprive them of fundamental property interests, and (2) the Clean Water Act provides them no opportunity for meaningful judicial review of the compliance order. "[T]he central meaning of procedural due process [is that] '[p]arties whose rights are to be affected are entitled to be heard.'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864)). The hearing must be provided "at a meaningful time and in a meaningful manner." *Armstrong*, 380 U.S. at 552. As demonstrated below, the compliance order violates the Sacketts' due process rights because the Clean Water Act, as interpreted by the Ninth Circuit and EPA, does not afford meaningful judicial review.

A. The Compliance Order Has Deprived the Sacketts of Protected Interests

The compliance order has deprived the Sacketts of the only permitted economically viable use of their property. *Cf. Fuentes*, 407 U.S. at 86 ("Any significant taking of property . . . is within the purview of the Due Process Clause."); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 342 (1969) (Harlan, J., concurring) (deprivation of the use of property falls within the Due Process Clause's scope). The compliance order states that the Sacketts have committed "a violation of

section 301 of" the Clean Water Act, and as a consequence they must immediately cease their homebuilding project by "remov[ing] all unauthorized fill material placed" on their lot, Pet. Cert. App. G-3 - G-4, at a cost of approximately $27,000, *see* Decl. of Michael Sackett ¶ 6. Further, the order mandates that the property be "restored" to EPA's satisfaction, Pet. Cert. App. G-4, G-6. In essence, the compliance order renders the Sacketts' property a conservation preserve for the indefinite future. The order also denies the Sacketts the fundamental right to exclude others from their property by requiring them to grant access "to EPA employees and/or their designated representatives" and to allow these persons "to move freely at the site and appropriate off-site areas in order to conduct actions that EPA determines to be necessary." *Id.* G-5. *Cf. Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (observing that the "right to exclude others from entering and using her property [is] perhaps the most fundamental of all property interests").

Additionally, because the order was issued without probable cause, *cf. TVA*, 336 F.3d at 1241 (the standard for the issuance of a Clean Water Act compliance order "is less rigorous than the probable cause standard"), it therefore denies the Sacketts the right to be free from unreasonable searches[11] by

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[11] The Court has only lessened the traditional Fourth Amendment requirements of warrant and probable cause for "pervasively regulated" industries, *New York v. Burger*, 482 U.S. 691, 702 (1987), and even then only when, among other things, the discretion given to those doing the searching is "'carefully limited in time, place, and scope,'" *id.* at 703 (quoting *United States v. Biswell*, 406 U.S. 311, 315 (1972)). Not only is homebuilding not

(continued...)

requiring that they "provide access to all records and documentation related to the conditions at the Site and the restoration activities conducted pursuant to [the compliance order]." J.A. 22. The order requires that the Sacketts fall into line or else suffer a frightful gamut of "SANCTIONS," Pet. Cert. App. G-7, including civil penalties of up to $37,500 per day. *Cf. Connecticut v. Doehr*, 501 U.S. 1, 24 (1991) (holding that an attachment to real property, which did not inhibit the owner's direct use or enjoyment of his property, nevertheless violated due process because the attachment was not preceded by a hearing).

Thus, the order "as a practical matter drive[s the Sacketts] to the wall," *Sniadach*, 395 U.S. at 341-42, deprives them of recognized property interests, and undermines the Constitution's due process guarantees.

B. The Sacketts Have Not Been Afforded Meaningful Review of the Compliance Order

The Sacketts have been afforded no review of the compliance order, but instead have been kept in a state of limbo and uncertainty, never knowing if or when EPA will bring an enforcement action or whether they will ever obtain meaningful review of the compliance order. Regardless of whether the order should have been preceded by a hearing, *cf. ADEC*, 540 U.S. at 483 (raising *sua sponte* but not resolving due process issues

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[11] (...continued)
a pervasively regulated industry, but the Sacketts' compliance order is by no means carefully limited in its scope. Rather, the order essentially gives unfettered access to EPA's representatives. Thus, as stated in the text, the order deprives the Sacketts of their interest in being free from unreasonable searches and seizures of their property and effects.

involved in the procedure producing a Clean Air Act compliance order), the order should have been followed by a prompt hearing. *See Barry v. Barchi*, 443 U.S. 55, 60, 66 (1979) (holding that due process was violated when a horse trainer's occupational license was suspended for 15 days and no hearing was provided during that time, and the relevant statute provided no deadline for a hearing to be held); *Fuentes*, 407 U.S. at 75 (overturning a state replevin procedure that "eventually" allowed for a post-deprivation hearing). *Cf. Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 610 (1974) (upholding a state sequestration procedure in part on the grounds that the party deprived could trigger an "immediate" hearing on the legality of the sequestration); *id.* at 625 (Powell, J., concurring) ("An opportunity for an adversary hearing must . . . be accorded promptly after sequestration . . . .").

To determine how long of a delay is justified in affording a post-deprivation hearing, the Court "examine[s] the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken." *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 242 (1988).

In this case, the original compliance order was issued in November, 2007, and since that time the Sacketts have been afforded no review. There is no post-issuance administrative process and no judicial process that the Sacketts can initiate. Thus, where the balancing of interests might otherwise justify a delayed post-deprivation hearing, the regime under which the Sacketts have labored—one that provides *no* process

that they can initiate to seek review—is deficient under *Mallen*.

Further, the *Mallen* factors themselves compel the conclusion that a delay in review of four years (and counting) is constitutionally deficient.

First, the Sacketts' interest in the use of their land is an established, fundamental property right, and the compliance order completely deprives them of that use for the indefinite future.[12] *Cf. Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) (observing that the fee simple interest in land "is an estate with a rich tradition of protection at common law"); *id.* at 1019 n.8 (observing that the Court's cases "evince an abiding concern for the productive use of, and economic investment in, land").

Second, although EPA has an interest in the effective administration of the Clean Water Act, it has no interest in delaying indefinitely a determination of the legality of the Sacketts' homebuilding. *Barry*, 443 U.S. at 66 ("We . . . discern little or no state interest . . . in an appreciable delay in going forward with a full hearing," as "it would seem as much in the State's interest as [the regulated party's] to have an early and reliable determination with respect to [liability].").

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[12] Moreover, as already noted, the compliance order requires the Sacketts to give EPA's representatives extensive access to their property, *see* Pet. Cert. App. G-5, thereby substantially infringing on the Sacketts' right to exclude, *cf. Lingle*, 544 U.S. at 539, and their right to be free from unreasonable searches and seizures, *see supra* n.11.

Third, the compliance order process presents a high risk of erroneous determinations. The process that produces the order is entirely secret, with no notice given to property owners like the Sacketts. There is not even a "probable cause"-type hearing, the existence of which this Court has relied on to uphold deprivations under statutes that did not provide a full evidentiary hearing prior to a deprivation. *See Mallen*, 486 U.S. at 240-41; *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985); *Mathews v. Eldridge*, 424 U.S. 319, 337-40 (1976); *Mitchell*, 416 U.S. at 605-06. And to issue a compliance order, EPA can rely on "any information available" to it, *see* 33 U.S.C. § 1319(a)(3), which can include "a staff report, newspaper clipping, [or] anonymous phone tip." *TVA*, 336 F.3d at 1241. Indeed, as already noted, the standard for issuing a compliance order "is less rigorous than the probable cause standard." *Id.* Thus, the risks of a compliance order having been erroneously issued are high. Accordingly, consideration of the *Mallen* factors confirms that the Sacketts have not been afforded prompt and meaningful review.

At bottom, no system of review can be considered "prompt" where a landowner must wait indefinitely to receive a hearing. For that reason, the Clean Water Act compliance order regime is far worse than the suspension provision at issue in *Mallen*, where the employee was assured a hearing within 90 days, *see* 486 U.S. at 242-43, or the replevin law at issue in *Fuentes*, where review could be had "eventually," *see* 407 U.S. at 75. *Cf. Barry*, 443 U.S. at 74 (Brennan, J., concurring in part) ("To be meaningful, an opportunity for a full hearing and determination must be afforded at least at a time when the potentially irreparable and

substantial harm . . . can still be avoided . . ."). The original compliance order was issued in November, 2007, and the Sacketts have still not obtained any review, let alone meaningful review. Therefore, enforcement of the order without such review violates the Sacketts' due process rights.

C. The Modes of Review That the Ninth Circuit Concluded Constitute Meaningful Review of the Compliance Order Are Either Not Meaningful or Are Nonexistent

The Ninth Circuit ruled below that the Sacketts' due process rights have not been violated because the Sacketts do have opportunities for meaningful review. *See* Pet. Cert. App. A-11 - A-15. That is simply not so.

1. A Clean Water Act Enforcement Action Does Not Provide Meaningful Review of a Compliance Order

The Ninth Circuit reasoned that the Sacketts can obtain meaningful review through an action brought by EPA to enforce the compliance order under Section 309(b), 33 U.S.C. § 1319(b), of the Clean Water Act. *See* Pet. Cert. App. A-11 - A-13. But such review is constitutionally deficient for at least two reasons.

First, the Sacketts cannot initiate Section 309(b) review. Rather, such review is at the mercy and unreviewable whim of EPA. Review cannot be meaningful if the regulated party must be forever subject to a Damoclean sword, never certain whether or when EPA will let the sword drop and seek immense penalties at the rate of $37,500 per day, or use the party's continued activity despite the order as a reason

to seek criminal penalties. *Cf. Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (White, J., concurring in part and dissenting in part) (observing that the promise of ultimate judicial vindication means little in such circumstances because "the value of a sword of Damocles is that it hangs—not that it drops"). Further, an argument that such review is meaningful would be inconsistent with this Court's case law emphasizing that a post-deprivation hearing must be given promptly. *See Gilbert v. Homar*, 520 U.S. 924, 932 (1997); *Mallen*, 486 U.S. at 242-43; *Barry*, 443 U.S. at 66; *Mitchell*, 416 U.S. at 610; *id.* at 625 (Powell, J., concurring).

Second, review through Section 309(b) can only be had if the Sacketts violate or fail to comply with the compliance order. As noted, each day the Sacketts fail to comply with the order (by, for example, not removing the fill and commencing restoration), they incur potential liability of up to $37,500 in civil penalties. But it is a fundamental principle of due process that review is not meaningful, and thus is constitutionally inadequate, if it can only be obtained by risking immense civil liability. *See Ex parte Young*, 209 U.S. at 148; *Thunder Basin*, 510 U.S. at 217-18; *id.* at 221 (Scalia, J., concurring in part and concurring in the judgment).

The Court's leading decision in this area of Due Process jurisprudence is *Ex parte Young*. The case arose out of nine suits in equity brought by shareholders of various railroad companies to challenge the validity of several passenger and freight rate orders. *See* 209 U.S. at 127-29. The shareholders contended that the rate orders were unconstitutional both because they were confiscatory, and because there

was no way to obtain judicial review of the orders without violating them and thereby risking significant civil and criminal liability. *See id.* at 131.

This Court agreed with the stockholders. The Court held that "when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate" a party from seeking judicial review, "the result is the same as if the law in terms prohibited" such review. *Id.* at 147. The Court therefore held unconstitutional the enforcement provisions of the rate laws and orders. The Court reasoned that to offer a party judicial review only on the condition "that if unsuccessful he must suffer imprisonment and pay fines" is the functional equivalent of closing up all access to the courts. *Id.* at 148.

Thus, the principle of *Ex parte Young* is that review is constitutionally deficient if it can only be had by risking significant civil or criminal liability, where compliance with the law foregoes the possibility of judicial review. *Cf. Thunder Basin*, 510 U.S. at 218 (describing *Ex parte Young* as affirming the principle that due process is violated when a party must "choose" between "onerous" compliance costs and "coercive penalties" to obtain judicial review); *id.* at 221 (Scalia, J., concurring in part and concurring in the judgment) ("The constitutional defect in *Young* was that the dilemma of either obeying the law and thereby for-going any possibility of judicial review, or risking 'enormous' and 'severe' penalties, effectively cut off all access to the courts.").

Accordingly, review of a compliance order under Section 309(b) is constitutionally inadequate. Such review is only possible if the Sacketts ignore and

thereby violate the order, and in so doing trigger substantial potential liability in civil penalties. A single year of noncompliance with the order amounts to more than $13 million in potential liability. To the Sacketts, that is as "immense" as the liability the railroad companies faced in *Ex parte Young*, and thus has as much, if not more, of a chilling effect on the exercise of the right of judicial review that the Due Process Clause guarantees. And like the railroad companies, the Sacketts cannot obtain review of the order by complying with the order, nor can they recover compliance costs. Rather, compliance merely compounds the constitutional injury by forcing the Sacketts to forego their homebuilding and to leave their parcel undeveloped and unusable for the indefinite future. Thus, obedience to the compliance order produces a result just as "confiscatory" as obedience to the rate orders in *Ex parte Young*.

The conclusion that Section 309(b) review is constitutionally inadequate is consistent with *Thunder Basin*, on which the Ninth Circuit relied below. *Thunder Basin* arose out of the Federal Mine Safety and Health Amendments Act, 30 U.S.C. § 801, *et seq*. The Act and its regulations authorize mining employees to elect representatives who have the right to inspect a mine twice yearly and obtain health and safety information about a mine. *See Thunder Basin*, 510 U.S. at 203 (citing, inter alia, 30 U.S.C. §§ 813, 819). Also under the Act, mining companies are required to post the names of the employees' representatives. *See Thunder Basin*, 510 U.S. at 204 (citing 30 C.F.R. § 40.4 (1994)).

In *Thunder Basin*, the mining company objected that the Mining Act required it to recognize two

members of the United Mine Workers Association (who were not employees of the mining company) as its employees' designated representatives. *See* 510 U.S. at 204. The mining company therefore filed suit in district court contending that the designation of union nonemployees violated the company's collective bargaining rights. *See id.* at 205. Although the district court ruled in the mining company's favor, the court of appeals reversed, holding that the mining company could not seek review through its own district court action, but instead had to pursue review first through the Mining Act's administrative process. *See id.* at 206 (citing *Thunder Basin Coal Co. v. Martin*, 969 F.2d 970 (10th Cir. 1992)).

Before this Court, the mining company argued that it was entitled to judicial review by an Article III court because the mining company's due process rights would be violated without such review. *See* 510 U.S. at 216. The Court rejected the mining company's argument. The majority observed that compliance with the Mining Act would not effect a serious deprivation, because it was very unlikely that the representatives of the mining employees would abuse their privileges and that, even if such abuse were in theory possible, the record before the Court did not substantiate such abuse. *See id.* at 216-17. Similarly, the majority noted that compliance with the Act's administrative review process while ignoring the Act's requirements would not create a serious pre-hearing deprivation for the mining company. Any fines incurred would become due and payable only after an adjudication, which would allow review of the administrative order or citation. *See id.* at 217-18. Further, the Act authorizes mine operators to obtain temporary relief from certain orders, and to expedite

the administrative process. *See id.* at 218 (citing 30 U.S.C. §§ 815, 816). The majority therefore concluded that the mining company was not in the same position as the railroad companies in *Ex parte Young*. The majority also noted that the mining company's quandary did not "approach a situation in which compliance is sufficiently onerous and coercive penalties sufficiently potent that a constitutionally intolerable choice might be presented." *Thunder Basin*, 510 U.S. at 218. The *Thunder Basin* concurrence expanded upon the majority's distinction by noting that the mining company, unlike the railroad officials, could comply with an agency order while seeking review of that order. *See id.* at 221 (Scalia, J., concurring in part and concurring in the judgment). *See also Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 49 n.12 (2000) (Thomas, J., dissenting).

But the Sacketts are in a much worse position than the mining company in *Thunder Basin*. First, the Sacketts cannot initiate review of the compliance order: unlike the Mining Act, the Clean Water Act provides no mechanism for review initiated by compliance order recipients. Second, the Sacketts already have been subjected to a serious deprivation. *See supra* Part I.A. *Cf. Doehr*, 501 U.S. at 11-12. Unlike the mining company, which simply had to post certain information and submit to a biannual inspection, the Sacketts have been ordered to stop using their property entirely for the indefinite future, and allow essentially unfettered access to their property and records. Third, the Clean Water Act, unlike the Mining Act, does not authorize temporary relief from compliance orders or provide for expedited review. Indeed, the Clean Water Act provides no

means of review at all. Finally, the Sacketts, unlike the mining company, cannot comply with the order *and* seek judicial review. Rather, Section 309(b) review can be maintained only by a failure to comply. Thus, a comparison of the Sacketts' predicament to the mining company's in *Thunder Basin* confirms that Section 309(b) review is constitutionally inadequate: the Sacketts can only hope to obtain such review by risking immense civil liability and even then, the Sacketts' failure to comply cannot compel EPA to bring an enforcement action.

2. Neither the Clean Water Act's Allowance for Good Faith in Assessing Civil Penalties Nor the Act's Permitting Process Provide Meaningful Review of Compliance Orders

The Ninth Circuit attempted to distinguish the rule of *Ex parte Young* (as discussed in *Thunder Basin*) on two grounds: (1) the amount of any civil penalty is left ultimately to the judiciary; and (2) the Clean Water Act contains a permitting process, the outcome of which is judicially reviewable. *See* Pet. Cert. App. A-13 - A-15. But, as shown below, neither basis can legitimately distinguish the principle of *Ex parte Young*.

First, the fact that the judiciary has ultimate responsibility for imposing a civil penalty under the Clean Water Act does not make Section 309(b) review constitutionally adequate. The good faith of the Sacketts would be just one among many factors that a reviewing court might take into account. *See* 33 U.S.C. § 1319(d). There is no guarantee, however, that a court will reduce an otherwise immense civil penalty merely

because of the Sacketts' good faith. Requiring landowners like the Sacketts to gamble on the mercifulness of a district court judge is as demanding a condition to judicial review as requiring the Sacketts to brave potentially millions of dollars in civil liability. And in any event, even a 99% reduction in the maximum penalty for four years of noncompliance is still over $500,000, a figure extremely onerous and coercive to small landowners like the Sacketts.

Second, the Clean Water Act permitting process is no remedy either. In challenging a permitting decision, the Sacketts could never challenge the compliance order itself. For example, they could not argue that the order should never have been issued, or that they should not be liable for any fines. Rather, the Sacketts would be limited to contesting the agency's decision on the permit, *not* the agency's issuance of the compliance order. Moreover, the Sacketts cannot even initiate the permitting process until after the compliance order is fully resolved. *See* 33 C.F.R. § 326.3(e)(1)(ii) (2011). Hence, by the time the Sacketts could apply for a permit, there would no longer be any outstanding compliance order for which judicial review could be sought.

Finally, the permitting process does not provide meaningful review because it is ruinously expensive, potentially imposing costs greater than the value of the contemplated project. *Cf. Rapanos*, 547 U.S. at 721 (plurality opinion) (observing that the average cost of an individual Clean Water Act permit is about $270,000); Jonathan H. Adler, *Once More, With Feeling: Reaffirming the Limits of Clean Water Act Jurisdiction, in The Supreme Court and the Clean Water Act—Five Essays* 81, 83 ("All told, one study

estimates that the public and private sectors together spend $1.7 *billion* annually to obtain wetland permits."). And those costs are in addition to all the expenses (including civil penalties) necessary to resolve the compliance order and become merely eligible to submit a permit application.

Thunder Basin states that judicial review ceases to be meaningful if the costs of compliance are "sufficiently onerous." 510 U.S. at 218. That is the situation in which the Sacketts find themselves. Even with judicial review they will still have suffered irreparable harm. *Cf. Thunder Basin*, 510 U.S. at 220-21 (Scalia, J., concurring in part and concurring in the judgment) ("[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs."). And, obedience to the compliance order is exceedingly onerous. The order requires that the Sacketts: (1) "remove all unauthorized fill material" on the site; (2) place the removed fill material in "a location approved by . . . EPA"; and (3) "restor[e the site] to its original, pre-disturbance topographic condition with the original wetlands soils that were previously removed from the [s]ite." Pet. Cert. App. G-4. Just the removal of the fill will cost $27,000, on a small residential lot. *See* Decl. of Michael Sackett ¶ 6. The Sacketts must obey the compliance order's costly dictates just to apply for a permit to authorize a modest homebuilding project that is worth far less than the compliance costs that EPA is demanding. The Sacketts' compliance costs are therefore sufficiently onerous that the permitting process does not provide meaningful judicial review.

In sum, the compliance order has deprived the Sacketts of the only economically viable use of their

property permitted under local law, deprived them of their right to exclude unwanted persons from their property, and deprived them of their right to be free from unreasonable searches of their property and effects. The Sacketts have never received any review, let alone meaningful review, of the compliance order. Therefore, issuance of the compliance order without such review violates the Sacketts' due process rights.

II

CONGRESS DID NOT INTEND TO FORECLOSE MEANINGFUL AND CONSTITUTIONALLY ADEQUATE REVIEW OF THE COMPLIANCE ORDER UNDER THE ADMINISTRATIVE PROCEDURE ACT

The preceding section demonstrates that the compliance order drives the Sacketts "to the wall" by terminating their homebuilding project, depriving them of the only permitted economically viable use of their property, and violating their privacy. The severe effects of that order, coupled with the fact that it was issued without any process at all, underscores the need for judicial review under the APA. As discussed in greater detail below, the Sacketts' predicament distinguishes their case from others where this Court has held that APA review is unavailable: (1) the order is the end of the administrative process; (2) the order is directed to the Sacketts specifically; (3) the order has already adjudicated a violation of the Clean Water Act; (4) the order imposes severe sanctions, including devastating civil penalties at the rate of $37,500 per day; and (5) the Sacketts cannot initiate judicial review of the order.

These facts support the conclusion that the compliance order should be subject to judicial review under the APA. The presumption in favor of judicial review of agency action, the intent of Congress, and canons of statutory construction buttress that conclusion.

A. Congress Intended to Allow Review of Compliance Orders Under the Administrative Procedure Act

1. Judicial Review of Agency Action Is Presumed

The APA "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. § 702).[13] When determining whether an administrative action is subject to judicial

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[13] The Sacketts have suffered legal wrong and have been aggrieved by agency action in the form of EPA's compliance order. *Cf.* 5 U.S.C. § 702. The order both forbids the otherwise lawful use of the property and requires the Sacketts to embark on a costly wetlands "restoration" scheme without any hope of reimbursement. *Cf. Thunder Basin*, 510 U.S. at 220-21 (Scalia, J., concurring in part and concurring in the judgment) (observing that compliance with a government regulation later found to be invalid "almost *always* produces the irreparable harm of nonrecoverable compliance costs"). Further, as explained above, the order imposes liability of $37,500 per day for violations. Thus, not only do the Sacketts have Article III standing to challenge the compliance order, *cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), they fall within the Clean Water Act compliance order provision's zone of interests, *see Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970) (complainant must be "within the zone of interests to be . . . regulated by the statute").

review, the Court gives the APA's "generous" review provisions and "hospitable" interpretation. *Abbott Labs.*, 387 U.S. at 141. *See also Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) ("We begin with the strong presumption that Congress intends judicial review of administrative action."). The Court has emphasized that" '[v]ery rarely do statutes withhold judicial review' "; were it otherwise, then "'statutes would in effect be blank checks drawn to the credit of some administrative officer or board.'" *Id.* at 671 (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

2. A Congressional Intent to Preclude Judicial Review Under the Administrative Procedure Act Must Be "Fairly Discernible" from the Statute

"[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Labs.*, 387 U.S. at 140. "The statutory preclusion of judicial review must be demonstrated clearly and convincingly." *Nat'l Labor Relations Bd. v. Un. Food & Comm. Workers Union*, 484 U.S. 112, 131 (1987). Although this Court does not apply the "clear and convincing standard" in a strictly evidentiary sense, nevertheless "'the standard serves "as a useful reminder that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling."'" *Michigan Academy*, 476 U.S. at 672 n.3 (quoting *Block*, 467 U.S. at 350-51).

Consistent with the strong presumption in favor of judicial review, the paramount consideration in

determining if Congress intended to foreclose a given avenue of judicial review is whether meaningful review is otherwise available. *See Thunder Basin*, 510 U.S. at 207; *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). Other considerations that inform the analysis include the nature of the administrative action, as well as the statute's language, structure, objectives, and legislative history. *See Block*, 467 U.S. at 349. *See also Michigan Academy*, 476 U.S. at 673.

3. Judicial Review of the Compliance Order Under the Administrative Procedure Act Is Consistent With the Clean Water Act

a. The Absence of Meaningful Judicial Review of Compliance Orders Under the Clean Water Act Strongly Supports Judicial Review Under the Administrative Procedure Act

The leading consideration in determining statutory preclusion is whether a party can obtain meaningful judicial review of the agency action at issue if review under the APA is precluded. *See Thunder Basin*, 510 U.S. at 207. *Cf. Leedom v. Kyne*, 358 U.S. 184, 190 (1958) ("This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers."). This consideration is founded on the common-sense presumption that Congress does not intend to foreclose meaningful judicial review. *McNary*, 498 U.S. at 496. And judicial review is not meaningful if it can be obtained only by exposing oneself to significant liability. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138,

3150-51 (2010); *McNary*, 498 U.S. at 496-97. *Accord Ex parte Young*, 209 U.S. at 148.

Under this standard of "meaningfulness," the Clean Water Act does not offer adequate judicial review. The only provision authorizing review of compliance orders is Section 309(b). But the Sacketts cannot initiate review under that provision, and there is no administrative process through which the Sacketts can contest the compliance order and ultimately seek review in court. That is in sharp contrast to the preclusion cases where a regulated party could initiate review through an administrative process that would ultimately produce a judicially reviewable agency decision. *See Block*, 467 U.S. at 346; *Shalala*, 529 U.S. at 20-22; *Thunder Basin*, 510 U.S. at 209. Most important, the Sacketts' only chance at review (which is not even guaranteed) under Section 309(b) requires them to violate the order and invite an enforcement action, thereby running the risk of $37,500 per day in fines indefinitely.

Judicial review that can be obtained exclusively by risking such immense liability is categorically *not* meaningful. In *Free Enterprise Fund*, the petitioners contended that the Public Company Accounting Oversight Board violated the separation of powers doctrine and the Constitution's Appointments Clause. The government had argued that the petitioners could obtain adequate review of their claims through the Security and Exchange Commission, by violating the law and inviting the Board to impose a sanction, which could then be reviewed through the Commission and ultimately the courts. This Court rejected the government's position, concluding that judicial review is not meaningful if it

requires a party to run the risk of "a sizable fine." *See Free Enterp. Fund*, 130 S. Ct. at 3138.

The same conclusion should obtain here. To have any hope of judicial review under Section 309(b), the Sacketts must violate the compliance order, thereby exposing themselves to significant civil penalties. Review that can only be had by risking over $13 million in fines per year is not meaningful review. *See also McNary*, 498 U.S. at 496-97 (holding that judicial review within the context of a deportation proceeding was not meaningful review for illegal aliens who sought to challenge the government's handling of their amnesty petitions). *Cf. Shalala*, 529 U.S. at 22 (holding that review triggered at the cost of "a minor penalty" is meaningful).

Allowing judicial review of the compliance order under the APA is also supported by a comparison of the Sacketts' case to *Thunder Basin*. As noted previously, the Court there held that the petitioner mining company was not entitled to pre-enforcement review of a dispute arising under the Federal Mine Safety and Health Amendments Act. But the Mining Act's statutory scheme and the judicial review options open to the mining company were significantly different from the Sacketts' case; and those differences support a decision in favor of judicial review of the compliance order.

One important distinction is that the *Thunder Basin* mining company was truly seeking pre-enforcement review. In other words, no enforcement action of any sort had been taken against the mining company. Instead, the only action that had been taken was that a government agent had written to the mining company informing it that its conduct was not

in conformity with the law. *See Thunder Basin*, 510 U.S. at 204-05. Here, however, enforcement action *has* commenced against the Sacketts, in the form of a compliance order, complete with the assertion that substantial penalties are already accruing.

In *Thunder Basin*, the Mining Law's statutory scheme provided for an administrative process, initiated by the regulated party, to review citations and orders issued against mining companies, and that administrative process resulted in a judicially reviewable decision. *See id.* at 207-08 (citing, inter alia, 30 U.S.C. § 816). The Court therefore likened the case before it to those "involving *delayed* judicial review of final agency actions [where] Congress has allocated *initial* review to an administrative body." 510 U.S. at 207 (emphasis added). In contrast, the Clean Water Act offers no administrative process that can be initiated by the regulated party to review a compliance order, much less a process that produces a judicially reviewable agency decision, or a process that merely allocates initial decisionmaking to an agency.

Finally, the *Thunder Basin* mining company had the option of complying with any order or citation *and* seeking judicial review *without* incurring additional liability. *Thunder Basin*, 510 U.S. at 221 (Scalia, J., concurring in part and concurring in the judgment). *See Shalala*, 529 U.S. at 49 n.12 (Thomas, J., dissenting). But here, the only way for the Sacketts to obtain judicial review of the compliance order under Section 309(b) is to fail to comply with the compliance order; there is no way for the Sacketts to comply with the order and yet still obtain judicial review of the order. Thus, even by the standards of *Thunder Basin*,

the Sacketts cannot obtain meaningful judicial review under the Clean Water Act.

Accordingly, a strong presumption arises that Congress intended to provide meaningful judicial review of compliance orders under the APA.

b. The Nature of the Compliance Order Supports Judicial Review Under the Administrative Procedure Act

Statutory preclusion analysis also looks to the nature of the administrative action at issue. *See Block*, 467 U.S. at 345. The Sacketts' compliance order is like an injunction. The order forbids the Sacketts to build a house, and requires the Sacketts to "remove all unauthorized fill material," "restore[the site] to its . . . original wetlands soils," allow EPA officials "to move freely at the site and appropriate off-site areas," and "provide access to all records and documentation" related to the site's condition and restoration, among other actions. *See* Pet. Cert. App. G-4 - G-6. Like an injunction, the order imposes severe penalties on the Sacketts for noncompliance; indeed, the order imposes "SANCTIONS," *id.* G-7, including civil penalties for such failures. An agency, however, can impose sanctions on a party only to the extent that the agency has jurisdiction and has been authorized by law to do so. *See* 5 U.S.C. § 558(b). Both of these factors—jurisdiction and statutory authorization—are matters quintessentially disposed to judicial review. Moreover, even EPA concedes that a compliance order is fit for immediate judicial review, in the context of an enforcement action. Thus, the compliance order's

injunction-like nature, imposing "SANCTIONS" for noncompliance, supports judicial review.

This Court has held that a statutory remedy which by its nature depends on the discretion of a governmental actor and is meant to take effect quickly is an action that Congress probably did not intend for judicial review. *See Morris v. Gressette*, 432 U.S. 491, 501-05 (1977) (holding that the remedy set forth in Section 5 of the Voting Rights Act is not subject to judicial review). So also, the Court has held that a decision by a government agency not to proceed with an investigation—a decision which does not "necessarily affect[] any citizen's ultimate rights"—is an action that Congress probably did not intend for judicial review, because of its minimal ramifications. *See S. Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-55 (1979) (holding that the Interstate Commerce Commission's decision not to initiate an investigation into the legality of a proposed railroad rate increase is not subject to judicial review).

However, a comparison of the Sacketts' compliance order to the agency actions at issue in *Morris* and *Southern Railway Co.* supports judicial review under the APA. Unlike the Section 5 Voting Rights Act remedy in *Morris*, Congress did not intend compliance orders necessarily to be enforced or resolved expeditiously. In fact, one of the many inequities of the compliance order regime is precisely that EPA cannot be compelled to bring an enforcement action and can thereby let penalty liability increase. *See* Andrew I. Davis, Comment, *Judicial Review of Environmental Compliance Orders*, 24 Envtl. L. 189, 200-01 (1994). Further, if Congress had wanted and expected expeditious enforcement, it could have provided (but

did not provide) EPA the power to issue "super" compliance orders like those authorized by the Clean Air Act, 42 U.S.C. § 7401, *et seq.* *See id.* § 7603. Under that latter provision, EPA is authorized to issue a compliance order that operates exactly like a temporary restraining order. These orders immediately have the force of law and do not require judicial approval, but expire after 60 days. Congress also authorized the issuance of "standard" Clean Air Act compliance orders, which require judicial approval for enforcement and which this Court *has* held to be judicially reviewable. *See ADEC*, 540 U.S. at 483. That the Clean Water Act does not contain a "super" compliance order provision underscores that Congress did not believe that expeditious enforcement was necessary.

Unlike the Interstate Commerce Commission's decision not to investigate in *Southern Railway Co.*, compliance orders under the Clean Water Act *do* have significant impact on the rights and liabilities of recipients. In addition to the potential civil penalty liability, *see* 33 U.S.C. § 1319(d), compliance orders can also serve to augment liability for statutory violations and initiate criminal proceedings. *See* 95 Cong. House Hearings 1977, 209-10 ("[A]n intentional flouting of an order issued by the Administrator . . . would certainly require a more severe penalty than a negligent or unintentional violation."); Guidance, *supra*, n.6.

Thus, because of compliance orders' powerful coercive effect, as well as the absence of any congressional intent that such orders be enforced quickly, their nature supports judicial review under the APA.

c. The Clean Water Act's Structure and Enforcement Scheme Are Consistent with Judicial Review of Compliance Orders Under the Administrative Procedure Act

The Clean Water Act authorizes EPA to issue and enforce compliance orders in federal court, 33 U.S.C. § 1319(a)-(b), to obtain injunctive and other relief against violators, *id.* §§ 1319(b), 1364, to seek criminal and civil penalties for violations of the statute, *id.* § 1319(c)-(d), and to assess administrative penalties, *id.* § 1319(g). Judicial review of compliance orders under the APA is consistent with this scheme, for several reasons.

First, the bare fact that a statute does not expressly provide for judicial review of an agency action does not preclude review. *Michigan Academy*, 476 U.S. at 671. Rather, "nonreviewability [must] fairly be inferred." *Barlow v. Collins*, 397 U.S. 159, 166 (1970).

Second, Congress's allowance for judicial review of administrative penalty orders under Section 309(g), 33 U.S.C. § 1319(g), does not imply that review of compliance orders is unavailable. Administrative penalty orders are not the equivalent of compliance orders. *Compare* 33 U.S.C. § 1319(g)(1) *with id.* § 1319(a)(3). Moreover, an express provision for judicial review of one type of action under a statute is no reason to conclude that review of other actions under the statute is unavailable. *See Abbott Labs.*, 387 U.S. at 144.

Third, Congress's authorization for EPA to enforce compliance orders under Section 309(b) does not imply that Congress meant to foreclose compliance order recipients from obtaining their own review under the APA. Section 309(b) is addressed solely to agency enforcement. It does not address, let alone define, the scope of review a recipient of a compliance order may obtain. It therefore follows that no legitimate inferences can be drawn about Congress's intent with respect to judicial review of compliance orders based on a provision that only addresses agency enforcement of such orders.

This Court's case law supports that conclusion. In determining that a statute's structure precludes judicial review under the APA, the Court has often relied on a statute's administrative "channeling" provision to infer preclusion of other review not expressly forbidden; or the Court has relied on a provision that expressly precluded other forms of review to reach the same conclusion. *See, e.g.*, *Block*, 467 U.S. at 346 (relying on the statute's authorization for milk handlers to obtain review of milk market orders to conclude that judicial review by milk consumers was foreclosed); *United Food & Commercial Workers Union*, 484 U.S. at 131 (relying on the statute's intricate administrative and judicial review provisions for National Labor Relations Board orders to conclude that judicial review of prosecutorial decisions by the Board's general counsel was foreclosed); *Shalala*, 529 U.S. at 10, 12-13 (relying on the statute's channeling provision and express bar to other review to conclude that judicial review of regulations governing Medicare nursing home remedies and sanctions, outside of the channeling provision, was foreclosed); *Thunder Basin*, 510 U.S. at

208-09, 216 (relying on the statute's comprehensive scheme for review of orders by the Federal Mine Safety and Health Commission to conclude that review outside of that scheme was foreclosed); *United States v. Erika, Inc.*, 456 U.S. 201, 206-08 (1982) (relying on Medicare Part B's express administrative review provisions for amount determinations to conclude that judicial review of those determinations was foreclosed).

But the Court has never used the existence of a statutory authorization for the agency to initiate judicial action—an authorization which would indirectly allow a regulated party to obtain judicial review as a defendant—as a basis to conclude that Congress intended to foreclose other means of review for the regulated public. For example, in *Thunder Basin* this Court concluded that pre-enforcement judicial review was foreclosed in part because the statute contains (unlike the Clean Water Act) an express administrative review process, the results of which could be challenged in the courts of appeals. *See* 510 U.S. at 208-09 (citing 30 U.S.C. § 816(a)(1)). The statute also contains (like the Clean Water Act, *see* 33 U.S.C. § 1319(b)) express authorizations for the government to seek relief against an alleged violator directly in district court. *See* 30 U.S.C. §§ 818(a), 820(j). But the Court did not reason that pre-enforcement judicial review should be foreclosed because the mining company could indirectly obtain review as a defendant in a district court enforcement action. Rather, the Court found significant that Congress had authorized district court review for the agency *and* court of appeals review *for the regulated public*. Yet, as noted, there is no analogous court of appeals review structure for Clean Water Act

compliance orders that would preclude judicial review under the APA.

In *McNary*, 498 U.S. 479, this Court held that general federal question jurisdiction was available to review the petitioners' challenge to the Immigration and Naturalization Service's handling of amnesty applications, notwithstanding that illegal aliens could have obtained review of their legal claims in a deportation action brought by the agency. *See id.* at 496-97. Thus, in *McNary* the availability of judicial review within the context of a government-initiated enforcement action had no impact on the Court's ultimate conclusion with respect to the availability of other review.

Accordingly, the Clean Water Act cannot foreclose APA review of compliance orders simply because the Clean Water Act authorizes EPA to enforce those orders in court. The Act's structure and enforcement scheme are consistent with APA review of compliance orders.

d. The Clean Water Act's Objectives Support Review Under the Administrative Procedure Act

Another factor that the Court looks to in analyzing preclusion is the statute's objectives. *Block*, 467 U.S. at 345. The Clean Water Act's "stated objective was 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004) (quoting 33 U.S.C. § 1251). Judicial review of compliance orders under the APA is fully consistent with the Clean Water Act's objectives.

i. EPA's Prosecutorial Discretion

Judicial review is consistent with Congress's understanding of the extent of EPA's prosecutorial discretion under the Clean Water Act. Although allowing judicial review under the APA might result in EPA being in federal court sooner than it had planned, such review would not foreclose the agency from bringing its own enforcement action under Section 309(b). In other words, an APA action seeking review of a compliance order would have absolutely no legal effect on EPA's decision whether to enforce the compliance order under Section 309(b). *See* Davis, *supra*, 203.

ii. EPA's Ability to Respond Quickly to Environmental Hazards

Judicial review of compliance orders under the APA is consistent with EPA's ability to respond expeditiously to environmental dangers, for several reasons.

First, the Clean Water Act has an emergency provision, 33 U.S.C. § 1364, that authorizes the agency to go into court to obtain a temporary restraining order to respond to pressing environmental danger. The inclusion of such a provision implies that Congress did not intend compliance orders to be the principal vehicle for EPA to deal with environmental emergencies.

Second, as previously noted, the Clean Water Act does not provide EPA with the power to issue sweeping "super" compliance orders like those under the Clean Air Act. The fact that Congress gave EPA only the power to issue "standard" compliance orders to enforce

the Clean Water Act is further evidence that Congress did not intend EPA to address emergency situations with the compliance order power. It follows, therefore, that Congress did not believe that preclusion of judicial review of compliance orders was necessary for EPA to administer the Clean Water Act.

Third, when Congress is concerned that judicial review of compliance orders may hamper EPA's administration, it knows what to do: amend the law. Congress did precisely that with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9628, to provide that pre-enforcement review is generally unavailable for CERCLA compliance orders. *See id.* § 9613(h); P.L. 99-499, § 113(c), 100 Stat. 1647, 1649-50 (Oct. 17, 1986) (adding a new subsection (h)). Congress has not made any similar express limitation in the Clean Water Act. That there is no such express limitation implies that Congress did not intend to foreclose judicial review of compliance orders under the APA.

iii. Judicial and Administrative Workloads

Judicial review of compliance orders under the APA would be manageable for both courts and the agency, for several reasons.

First, an increase in federal court dockets is not a sound basis for inferring that judicial review is precluded under the APA. *See Abbott Labs.*, 387 U.S. at 154-55 (rejecting the contention that judicial review would result in "a multiplicity of suits in various jurisdictions challenging other regulations," because "the courts are well equipped to deal with such eventualities").

Second, EPA should welcome judicial review of compliance orders because it can provide both the agency and the regulated public with an early judicial determination about whether a statutory violation is actually ongoing and therefore must be addressed through permitting or enforcement. *See* Davis, *supra*, at 223-24. Indeed, this Court has underscored the value to the agency of early judicial review. *See Abbott Labs.*, 387 U.S. at 154 (noting approvingly that review of the challenged labeling regulations would be beneficial to the government because, "if the Government prevails, a large part of the industry is bound by the decree; if the Government loses, it can more quickly revise its regulation"). *See also Barry*, 443 U.S. at 66.

Third, only a small percentage of compliance order recipients will even seek judicial review, because (a) litigation is expensive and time-consuming, (b) many compliance order recipients, such as local governments and developers, will be repeat players with the agency and will have a strong incentive to get along, and (c) filing an APA lawsuit would not necessarily toll the effectiveness of the compliance order, such that the potential liability of suing and not complying may be too great to justify a lawsuit, *see* Davis, *supra*, at 205. Thus, most judicial challenges will be at the margins where the fact of the discharge is denied or a legitimate question of jurisdiction is presented.

Accordingly, APA review of compliance orders is consistent with the Clean Water Act's objectives.

e. The Clean Water Act's Legislative History Is Consistent With Judicial Review Under the Administrative Procedure Act

Another factor to determine statutory preclusion is the existence of "specific legislative history that is a reliable indicator of congressional intent." *Michigan Academy*, 476 U.S. at 673. The Clean Water Act's legislative history contains no specific statement that would support preclusion of judicial review of compliance orders under the APA. The legislative history merely indicates that the Act's compliance order provisions were modeled after the Clean Air Act's analogous provisions.[14] *See* S. Rep. No. 92-414 at 63-64 (1971). But the Clean Air Act's enforcement provisions do not support the conclusion that judicial review of compliance orders is foreclosed. This Court held in *ADEC* that a Clean Air Act compliance order is reviewable final agency action. *See ADEC*, 540 U.S. at 483. Thus, it would be incongruous to rely on Clean Air Act legislative history to conclude that Clean Water Act compliance orders are unreviewable but Clean Air Act compliance orders are.[15] Accordingly, the Clean

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[14] Other enforcement provisions of the Clean Water Act were modeled after the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 407. *See* S. Rep. No. 92-414, at 63-64 (1971).

[15] It is true that a proposed version of the Clean Air Act contained an express authorization for judicial review compliance orders, and that the authorization was deleted without comment before enactment. *See Lloyd A. Fry Roofing Co. v. U.S. EPA*, 554 F.2d 885, 890 (8th Cir. 1977). But there are many reasons why such a provision would have been deleted, reasons having nothing to do with Congress' intent as to reviewability. *See* Davis, *supra*, at 199.

(continued...)

Water Act's legislative history offers no basis to preclude review of compliance orders under the APA.

4. The Ninth Circuit's Interpretation of the Clean Water Act Is Fundamentally Flawed

The Ninth Circuit below recognized that the Clean Water Act does not expressly or by clear implication preclude judicial review of compliance orders as part of a Section 309(b) enforcement proceeding. Pet. Cert. App. A-12, A-15. Nevertheless, the court ruled that the Sacketts are precluded from initiating review under the APA because of purported inferences from the Clean Water Act showing that Congress intended that review of compliance orders, and their enforcement, should take place in a single action. *See id.* A-6 - A-9. The court reached this conclusion through an analysis that failed to employ basic principles of statutory interpretation, gave no weight to the presumption of judicial review, and misapplied the statutory preclusion factors.

The Ninth Circuit's analysis ignores the obligation to interpret the Clean Water Act and the APA *in pari materia*. *Cf. Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 315-16 (2006) ("[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read as if they were one law.") (internal quotation marks

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[15] (...continued)
See generally Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 170 (2001) ("A bill can be proposed for any number of reasons, and it can be rejected for just as many others."). Accordingly, a congressional intent to preclude judicial review cannot be supported by such slender evidence from the legislative history.

omitted). By limiting its analysis to just the Clean Water Act, the court failed to acknowledge the provisions of the APA that add weight to the presumption of judicial review, such as the provision governing the imposition of sanctions. That section of the Act provides that "[a] sanction may not be imposed . . . except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. § 558(b). The issues of agency jurisdiction and statutory authority therefore call for judicial review.

Further, the Ninth Circuit's analysis produces the incongruous conclusion that the Clean Water Act creates a different mode of judicial review of EPA's actions than that prescribed by the APA when judicial review does occur as part of a Section 309(b) enforcement action. The review that the Ninth Circuit envisioned is not cabined by the "administrative record" rule which generally governs review of agency action. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971). Rather, review in a Section 309(b) enforcement action (as delimited by the Ninth Circuit) is to be conducted on a record created for judicial review and not on the record before the agency at the time the decision was made. *See* Pet. Cert. App. A-11 - A-12. According to the Ninth Circuit, the reviewing court is free to substitute its judgment for that of the agency based on the court's independent weighing of the evidence presented in the action. *See id.* at A-12 ("We therefore hold that the term 'any order' in § 1319(d) refers only to orders predicated on actual violations of the [Clean Water Act] as identified by a district court in an enforcement proceeding according to traditional rules of evidence and standards of proof."). In crafting this nonstatutory review proceeding, the Ninth Circuit unwittingly

revived the moribund doctrine of *Crowell v. Benson*, 285 U.S. 22, 60-65 (1932) (allowing a de novo trial of jurisdictional facts previously determined in an agency proceeding).

Relatedly, the Ninth Circuit's reasoning creates a new concept of an "order" outside of the APA's definition of an order as the "final disposition . . . of an agency in a matter." 5 U.S.C. § 551(6). The court's implicit new definition is that a Clean Water Act compliance order is a type of preliminary determination based on a minimal record that will not be enforceable until the agency creates a new record at a later date.

Most important, the Ninth Circuit's ruling is not based on the Clean Water Act's express language. Rather, it is based on inferences the court found to be "fairly discernible" from that statute. Yet, the APA expressly prohibits the use of this form of analysis to modify its provisions. *See* Administrative Procedure Act, 79 Pub. L. No. 404, § 12, 60 Stat. 237, 244 (1946) ("No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly.").

The Ninth Circuit's flawed analysis notwithstanding, the nature of compliance orders, along with the Clean Water Act's text, structure, objectives, and legislative history, support judicial review under the APA. Without the APA, the Sacketts would have no meaningful review. The Clean Water Act therefore does not preclude such review.

B. The Avoidance Canon Confirms That the Clean Water Act Should Be Read to Preserve the Sacketts' Due Process Rights and Meaningful Judicial Review

A cardinal rule of statutory construction is the avoidance canon, which provides that, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The doctrine, having its roots in the opinions of Chief Justice Marshall, directs that "'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Id.* (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Avoiding interpretations that would render statutes unconstitutional "not only reflects the prudential concern that constitutional issues not be needlessly confronted"; such an approach "also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution." *Id.* The Court "will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties." *Id.*

The avoidance doctrine requires that the Clean Water Act be construed as not forbidding meaningful judicial review of compliance orders through the APA. As explained above, *see, supra*, Part I, without judicial review under the APA, the Sacketts are deprived of fundamental property and privacy rights without due process of law. The Clean Water Act does not offer

meaningful review of the compliance order. There is no administrative process for review of compliance orders. The Sacketts cannot initiate review under the Clean Water Act. And the only "review" the Sacketts can obtain through a Section 309(b) enforcement action comes at the risk of incurring significant civil liability, and the added risk of criminal liability.

Congress could not have intended to leave landowners like the Sacketts at the mercy of EPA, forever threatened by ruinous penalties. In short, Congress could not have intended to deprive the Sacketts of meaningful judicial review under the APA. The avoidance doctrine therefore confirms the appropriateness of an interpretation of the Clean Water Act that would afford such meaningful review to the Sacketts under the APA.

III

THE COMPLIANCE ORDER CONSTITUTES FINAL AGENCY ACTION

Judicial review of agency action under the APA is based in part on the existence of a "final agency action." *See* 5 U.S.C. § 704. This Court has interpreted the Act's finality requirement as mandating a two-part analysis: (1) whether the action represents the consummation of the agency's decisionmaking; and (2) whether the action determines the rights or obligations of the parties, or is an action from which legal consequences flow. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The Sacketts' compliance order constitutes final agency action.

First, the compliance order represents the consummation of EPA's decisionmaking process. As a logical prerequisite to the issuance of the challenged

compliance order, EPA had to determine that it has regulatory authority over the Sacketts' property. The agency has done so. There are no further steps for the agency to take with respect to jurisdiction, or with respect to the order's issuance. The order does not initiate any administrative process, nor is there any administrative process whereby the Sacketts can seek review of the order. Moreover, the order is immediately enforceable in court by the EPA under Section 309(b).

The compliance order is no less final simply because, at some point in the undetermined future, EPA may change its position on the extent of its authority. That is always possible (and would have been possible in *Bennett* itself). *Cf. Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 739-40 (D.C. Cir. 1990). What matters is that EPA has determined that it has authority, and has issued a putatively valid compliance order on that basis. The agency's decisionmaking process with respect to whether to issue the order is complete.

Second, legal consequences flow from the compliance order. Violation of the order is itself actionable and punishable by civil penalties. *See supra* n.8. Whereas prior to the order's issuance the Sacketts would have been at most liable for statutory violations of the Clean Water Act, in light of the order's issuance the Sacketts are now potentially liable for violations of the statute *and* violations of the order itself.

That the compliance order issued against the Sacketts is final agency action is confirmed by this Court's decision in *ADEC*, 540 U.S. 461. There, the petitioner sought review of a compliance order issued under the Clean Air Act. Before addressing the merits

of the petitioner's challenge, the Court analyzed whether the order constituted final agency action under the Clean Air Act's judicial review provision, 42 U.S.C. § 7607(b). *See ADEC*, 540 U.S. at 483. The Court affirmed the Ninth Circuit's conclusion that the order was final agency action under *Bennett*. The Court held that the order represented EPA's "final position" on whether the underlying permit at issue used the best available control technology under the Clean Air Act. *See id.* The Court also held that the order met *Bennett*'s second prong because of the "practical and legal consequences" that flow from the order, including the "vulnerability to penalties." *See id.* As noted above, these same points apply with equal force to the order issued against the Sacketts. *Cf. TVA*, 336 F.3d at 1256 n.32 (observing that the Clean Water Act and Clean Air Act compliance order regimes are substantially the same). Accordingly, under *Bennett* and *ADEC*, the compliance order issued against the Sacketts constitutes final agency action under 5 U.S.C. § 704.[16]

CONCLUSION

EPA has ordered the Sacketts to stop their homebuilding project, restore their property to its original condition, and leave the property in an untouched state for the indefinite future. The Sacketts must comply with EPA's command or risk immense civil penalties and possibly criminal penalties as well.

[16] Further, the Sacketts have no other adequate judicial remedy. *Cf.* 5 U.S.C. § 704. That conclusion follows for the same reasons that the Clean Water Act does not afford the Sacketts meaningful judicial review of the compliance order. *See, supra*, Part II.A.3.a.

The Sacketts have abided under the order's prohibitive strictures for nearly four years, yet they have never been given any review, much less meaningful review. Without such review, the Sacketts' due process rights are violated. But the constitutionality of the Clean Water Act can be upheld if this Court holds that Congress did not intend to foreclose judicial review of compliance orders under the APA.

For the foregoing reasons, the judgment of the court of appeals should be reversed.

DATED: September, 2011.

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RESPONDENT'S BRIEF

No. 10-1062

In the Supreme Court of the United States

CHANTELL SACKETT AND MICHAEL SACKETT,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. May petitioners seek pre-enforcement judicial review of the administrative compliance order pursuant to the Administrative Procedure Act, 5 U.S.C. 704?

2. If not, does petitioners' inability to seek pre-enforcement judicial review of the administrative compliance order violate their rights under the Due Process Clause?

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Constitutional, statutory and regulatory provisions involved 2
Statement 2
Summary of argument 10
Argument 13
I. A Section 309(a)(3) compliance order is a means of providing regulatory guidance and encouraging voluntary compliance, rather than a self-executing enforcement measure, and courts have recognized that such agency communications ordinarily should not be subject to pre-enforcement judicial review . 13
II. Petitioners may not obtain pre-enforcement judicial review of the EPA compliance order pursuant to the Administrative Procedure Act 24
A. The compliance order is not "final agency action" 24
B. The CWA precludes pre-enforcement judicial review of administrative compliance orders 34
III. The Due Process Clause does not entitle petitioners to pre-enforcement review of the compliance order 44
A. The issuance of the compliance order did not subject petitioners to a pre-hearing deprivation 45
B. Because the CWA contains constitutionally adequate procedural safeguards before petitioners may be subject to penalties, the Due Process Clause does not require pre-enforcement review of compliance orders 47

Table of Contents—Continued: Page

Conclusion 55
Appendix – Constitutional, statutory and regulatory provisions 1a

TABLE OF AUTHORITIES

Cases:

AT&T v. *EEOC*, 270 F.3d 973 (D.C. Cir. 2001) 21, 22, 27, 37
Abbott Labs. v. *Gardner*, 387 U.S. 136 (1967), abrogated on other grounds, 430 U.S. 99 (1977) 24
Air Brake Sys. Inc. v. *Mineta*, 357 F.3d 632 (6th Cir. 2004) 20
Air Cal. v. *United States Dep't of Transp.*, 654 F.2d 616 (9th Cir. 1981) 20
Alaska Dep't of Envtl. Conservation v. *EPA*:
244 F.3d 748 (9th Cir. 2001) 33
540 U.S. 461 (2004) 32, 33, 37, 41
American Fed'n of Gov't Employees, AFL-CIO v. *O'Connor*, 747 F.2d 748 (D.C. Cir. 1984), cert. denied, 474 U.S. 909 (1985) 21
Baccarat Fremont Developers, LLC v. *United States Army Corps of Eng'rs*, 425 F.3d 1150 (9th Cir. 2005), cert. denied, 549 U.S. 1206 (2007) 4, 53
Bennett v. *Spear*, 520 U.S. 154 (1997) 11, 24
Block v. *Community Nutrition Inst.*, 467 U.S. 340 (1984) 12, 34, 35, 39
City of San Diego v. *Whitman*, 242 F.3d 1097 (9th Cir. 2001) 21
Connecticut v. *Doehr*, 501 U.S. 1 (1991) 45

Cases—Continued: Page

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FTC v. *Standard Oil Co. of Cal.*, 449 U.S. 232 (1980) 11, 25, 27
Fairbanks N. Star Borough v. *United States Army Corps of Eng'rs*, 543 F.3d 586 (9th Cir. 2008), cert. denied, 129 S. Ct. 2825 (2009) 28, 53
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NLRB v. *United Food & Commercial Workers Union Local 23*, 484 U.S. 112 (1987) 40
National Ass'n of Home Builders v. *Norton*, 415 F.3d (D.C. Cir. 2005) 29
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Cases—Continued: Page

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Phillips Petroleum Co. v. *Lujan*, 963 F.2d 1380 (10th Cir. 1992) 25
Precon Dev. Corp. v. *United States Army Corps of Eng'rs*, 633 F.3d 278 (4th Cir. 2011) 51, 52
Rapanos v. *United States*, 547 U.S. 715 (2006) 2, 8
Reisman v. *Caplin*, 375 U.S. 440 (1964) 48, 52
Reliable Automatic Sprinkler Co. v. *CPSC*, 324 F.3d 726 (D.C. Cir. 2003) 20, 22, 25, 29
Shalala v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000) 34
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Southern Pines Assocs. v. *United States*, 912 F.2d 713 (4th Cir. 1999) 39
Thunder Basin Coal Co. v. *Reich*, 510 U.S. 200 (1994) ..... *passim*
United States v. *Bay-Houston Towing Co.*, 197 F. Supp. 2d 788, 823 (E.D. Mich. 2002) 50
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United States v. *Deaton*, 332 F.3d 698 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004) 14
United States v. *Erika, Inc.*, 456 U.S. 201 (1982) 38
United States v. *Fausto*, 484 U.S. 439 (1988) 34, 35, 38
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USAA Fed. Sav. Bank v. *McLaughlin*, 849 F.2d 1505 (D.C. Cir. 1988) 21
Walker v. *City of Birmingham*, 388 U.S. 307 (1967) 16
West Va. Highlands Conservancy, Inc. v. *Huffman*, 625 F.3d 159 (4th Cir. 2010) 53
Wilson v. *Pena*, 79 F.3d 154 (D.C. Cir. 1996) 21
Yakus v. *United States*, 321 U.S. 414 (1944) 48
Young, Ex parte, 209 U.S. 123 (1908) 47, 48, 49, 52

Constitution, statutes, regulations and rule:

U.S. Const. Amend. V (Due Process Clause) 44, 47
Administrative Procedure Act, 5 U.S.C. 551 *et seq.* 4
5 U.S.C. 559 35
5 U.S.C. 701(a)(1) 34
5 U.S.C. 704 ..... 11, 24, 34, 51
5 U.S.C. 706(2)(A) 8, 37
Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (42 U.S.C. 7401 *et seq.*) 40
42 U.S.C. 7413(a)(5) 33
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42 U.S.C. 7477 33
42 U.S.C. 7603 41
42 U.S.C. 7607(b)(1) 41
Clean Water Act, Pub. L. No. 92-500, § 2, 86 Stat. 816 (33 U.S.C. 1251 *et seq.*) 2
33 U.S.C. 1251(a) 2

Statutes, regulations and rule—Continued: Page

33 U.S.C. 1311(a) 2, 6
33 U.S.C. 1318 ..... 4, 46
33 U.S.C. 1318(a) 46
33 U.S.C. 1319 4
33 U.S.C. 1319(a) 46
33 U.S.C. 1319(a)(3) 5, 14, 28, 36, 38
33 U.S.C. 1319(b) 5, 14, 15, 38
33 U.S.C. 1319(c) 6, 16
33 U.S.C. 1319(d) ..... *passim*
33 U.S.C. 1319(g) 5, 18
33 U.S.C. 1319(g)(1)(A) 18
33 U.S.C. 1319(g)(8) 5, 18, 38
33 U.S.C. 1342 3
33 U.S.C. 1344 2
33 U.S.C. 1344(a) 3, 51, 52
33 U.S.C. 1344(b) 3
33 U.S.C. 1344(c) 3
33 U.S.C. 1344(e)(1) 3
33 U.S.C. 1344(g)-(h) 3
33 U.S.C. 1344(n) 4
33 U.S.C. 1344(s) 4
33 U.S.C. 1362(6) 2
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Statute and regulations and rule—Continued: Page

28 U.S.C. 2462 ..... 8, 50
16 C.F.R. 1115.20 20
33 C.F.R.:
Pts. 320-325 3
Pts. 325-326 4
Pt. 326:
Section 326.3(e) 31, 50
Section 326.3(e)(1) 32
Section 326.3(e)(1)(iv) 31
Section 326.3(e)(2) 32
Section 326.3(g) 32
Pt. 330:
Section 330.1 3
Section 330.1(e) 53
Section 330.1(f) 3
Pt. 331 4
Section 331.2 ..... 4, 53
Section 331.5 4
Section 331.10 51
Section 331.12 ..... 4, 51
40 C.F.R.:
Pt. 19 6
Section 19.4 49
Pt. 230 3
Section 230.3(s) 2
Fed. R. Civ. P. 13 37

Miscellaneous: Page

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In the Supreme Court of the United States

No. 10-1062

CHANTELL SACKETT AND MICHAEL SACKETT,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 622 F.3d 1139. The opinion of the district court (Pet. App. C1-C7) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2010. A petition for rehearing was denied on November 29, 2010 (Pet. App. D1). The petition for a writ of certiorari was filed on February 23, 2011, and was granted on June 28, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent constitutional, statutory and regulatory provisions are set forth in an appendix to this brief. See App., *infra*, 1a-8a.

STATEMENT

1. a. Congress enacted the Clean Water Act (CWA or Act) "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a); see Pub. L. No. 92-500, § 2, 86 Stat. 816 (33 U.S.C. 1251 *et seq.*). Section 301 of the CWA prohibits the "discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. 1311(a). The term "pollutant" is defined to include, *inter alia*, "dredged spoil," "rock," and "sand." 33 U.S.C. 1362(6). "[D]ischarge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). The Act defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). The waters of the United States include certain wetlands. See 40 C.F.R. 230.3(s); *Rapanos* v. *United States*, 547 U.S. 715, 724-725 (2006) (plurality opinion); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985).

The CWA establishes two complementary permitting schemes through which appropriate federal or state officials may authorize discharges of pollutants from point sources into the waters of the United States. The permitting regime implicated in this case is set forth in Section 404 of the CWA, 33 U.S.C. 1344. That provision authorizes the United States Army Corps of Engineers (Corps), or a State with an approved program, to issue

a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a) and (g)-(h). Section 402 authorizes the United States Environmental Protection Agency (EPA), or a State with an approved program, to issue a National Pollutant Discharge Elimination System permit for the discharge of pollutants other than dredged or fill material. See 33 U.S.C. 1342.

b. The Corps and EPA share responsibility for implementing and enforcing the CWA's Section 404 permitting provisions. See, *e.g.*, 33 U.S.C. 1344(b) and (c). The two agencies have promulgated regulations governing the Corps' processing and issuance of Section 404 permits. See 33 C.F.R. Pts. 320-325; 40 C.F.R. Pt. 230. Those regulations afford a number of options to persons who wish to discharge dredged or fill material on property that may be subject to the CWA.

The CWA authorizes the Corps to issue general permits on a state, regional, or nationwide basis for discharges of dredged or fill material that will have only minimal effects. 33 U.S.C. 1344(e)(1); see 72 Fed. Reg. 11,092 (Mar. 12, 2007) (current nationwide general permits). When the Corps receives a Section 404 permit application, it first determines whether the proposed discharge is covered by an existing general permit. 33 C.F.R. 330.1(f). A discharge made in compliance with the conditions imposed by an applicable general permit can lawfully be undertaken without an individual permit. See generally 33 C.F.R. 330.1.

If no general permit covers the proposed discharge, the Corps then determines whether an individual permit should be issued. In considering the permit application, the Corps considers whether the property contains waters or wetlands covered by the CWA, and whether and

on what conditions a permit should be granted. See 33 C.F.R. Pts. 325-326. Subject to the administrative-appeal process, see 33 C.F.R. 331.5, 331.12, the Corps' issuance or denial of a permit—and any associated determination of the CWA's application to a particular site—constitutes final agency action that is subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* See, *e.g.*, *Baccarat Fremont Developers, LLC* v. *United States Army Corps of Eng'rs*, 425 F.3d 1150, 1153 (9th Cir. 2005), cert. denied, 549 U.S. 1206 (2007); 33 C.F.R. Pt. 331.

Without going through the entire permitting process, a potential discharger can also request an informal or formal Corps determination on whether particular waters (including wetlands) are covered by the CWA. See 33 C.F.R. 331.2 (jurisdictional determination); U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 08-02 (2008). In addition, the Corps has created numerous guidance documents designed to assist parties in determining whether the CWA may apply to their land and whether they may need a permit. See, *e.g.*, U.S. Army Corps of Engineers, *Recognizing Wetlands: An Informational Pamphlet (Wetlands)*, http://www.usace.army.mil/CECW/Documents/cecwo/reg/rw_bro.pdf; *Pictorial Representations of Jurisdiction*, http://www.usace.army.mil/CECW/Documents/cecwo/reg/juris_images.pdf. The Corps also encourages people to contact its local offices for assistance in determining whether a permit is required. See *Wetlands*.

c. When pollutants are discharged into covered waters without a permit, the Act and its implementing regulations establish a number of different enforcement mechanisms. See, *e.g.*, 33 U.S.C. 1318, 1319, 1344(n) and (s). In 1989, the Corps and EPA executed a memoran-

dum of agreement that allocates enforcement responsibility between the two agencies.[1] The Corps and EPA coordinate their efforts when taking enforcement actions and rely on the agreement to determine which agency will be the lead enforcement authority in a particular matter.

When (as in this case) EPA is the lead enforcement agency and finds "that any person is in violation of" Section 301 or other enumerated provisions of the CWA, the agency can either "issue an [administrative compliance] order requiring such person to comply with such section or requirement," or "bring a civil action in accordance with" Section 309(b). 33 U.S.C. 1319(a)(3). Alternatively, after providing an opportunity for an administrative hearing, either EPA or the Corps may assess administrative penalties (subject to smaller dollar limits than those that apply in judicial enforcement proceedings) for certain violations of the Act. 33 U.S.C. 1319(g). A person against whom an administrative penalty has been assessed may obtain judicial review of the order at the conclusion of the agency process. 33 U.S.C. 1319(g)(8).

If the recipient of a Section 309(a)(3) compliance order disobeys the order, EPA may not enforce the order directly. Rather, EPA may initiate a judicial enforcement action for appropriate relief, including a temporary or permanent injunction, "for any violation for which [EPA] is authorized to issue a compliance order" under Section 309(a)(3). 33 U.S.C. 1319(b). In an action brought under Section 309(b), the district court may impose civil penalties for violations of the Act, as well as

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[1] The agreement is available at http://water.epa.gov/lawsregs/guidance/wetlands/enfoma.cfm.

for violations of any prior administrative compliance order. 33 U.S.C. 1319(d). The defendant may assert any available ground for concluding that its conduct did not violate the CWA, including that the waters into which pollutants were discharged were not covered by the Act. If the court finds that a violation of the CWA occurred, it may award civil penalties up to a specified maximum (currently $37,500, see 40 C.F.R. Pt. 19) for each day of the violation, after considering several specified factors. 33 U.S.C. 1319(d). Persons who negligently or knowingly violate the Act are also subject to criminal prosecution in certain circumstances. 33 U.S.C. 1319(c).

2. Petitioners own a .63-acre parcel of undeveloped property in Idaho near Priest Lake. See Pet. App. A2. In April and May 2007, without consulting with the Corps or seeking a permit, petitioners filled in approximately one-half acre of their property with dirt and rock in preparation for building a house. *Ibid.* On November 26, 2007, EPA issued a compliance order to petitioners pursuant to Section 309(a)(3). J.A. 16-31; see Pet. App. A3.

The compliance order stated EPA's finding that petitioners had violated 33 U.S.C. 1311(a) by discharging fill material into regulated wetlands without a permit. J.A. 19-20; see Pet. App. A3. The order directed petitioners to remove the fill and restore the wetlands by April 15, 2008. J.A. 21.[2] In addition, however, the order "encour-

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[2] Consistent with EPA's general regulatory approach, the compliance order in this case stated that "[e]ach day the fill material remains in place without the required permit constitutes an additional day of violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a)." J.A. 20-21. That view underlay EPA's conclusion that removal of the fill, and restoration of the site to its prior condition, were necessary to bring an end to the violation and achieve prospective compliance with the Act. See

age[d]" petitioners to contact EPA and "address any allegations herein which [petitioners] believe to be inaccurate or requirements which may not be attainable and the reasons why." J.A. 21-23; see Pet. App. A3. The compliance order stated that failure to comply with the order could expose petitioners to civil penalties or to a suit for injunctive relief. J.A. 23-24. EPA subsequently revised the order to extend the compliance schedule and eliminate certain requirements related to restoration of the wetlands. Pet. App. F1-F3, G1-G7, H1-H4, I1-I4.

Between November 26, 2007, and April 1, 2008, petitioners never contacted EPA. On April 1, 2008, they requested a formal administrative hearing, asserting that the wetlands at issue were not regulated by the CWA. Pet. App. A3; C.A. R.E. 28. Neither the Act nor EPA's implementing regulations establish a formal hearing procedure for administrative compliance orders. Pet. App. A3. On April 4, based on the agency's assessment of ground and weather conditions at the site, EPA revised the prior order to extend the compliance schedule, directing petitioners to remove the unauthorized fill material by May 15, 2008. *Id.* at I1-I2. On April 11, EPA responded to petitioners' hearing request by letter, reiterating EPA's view that petitioners had violated the CWA, but stating that the agency was still in the process of "reviewing your letter and evaluating" enforcement options, and that a more detailed response would follow.

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ibid. Petitioners' complaint did not challenge that aspect of the compliance order. Thus, while petitioners alleged that the site at which they discharged fill was not subject to the CWA at all (see J.A. 13), they did not allege that the compliance measures specified in the order would be inappropriate if the Act applied.

C.A. R.E. 25. EPA also invited petitioners to contact the agency with questions or concerns.[3] See *ibid.*

3. On April 28, 2008, before EPA had supplemented its response to petitioners' request, petitioners filed suit in federal district court. J.A. 5-15. Petitioners alleged, *inter alia*, that the compliance order was arbitrary and capricious under the APA, 5 U.S.C. 706(2)(A), because the property on which they had discharged fill was "not subject to the CWA" under this Court's decision in *Rapanos, supra*. J.A. 13. EPA moved to dismiss the complaint for lack of subject-matter jurisdiction. Pet. App. A3. The district court granted EPA's motion and dismissed the suit. The court held that the CWA's text and structure indicated that Congress intended to preclude pre-enforcement judicial review of CWA compliance orders by channeling review of such orders into enforcement actions initiated by EPA under Section 309(b). *Id.* at C1-C7.

4. The court of appeals affirmed. Pet. App. A1-A15. The court explained that "[e]very circuit that has confronted this issue has held that the CWA impliedly precludes judicial review of compliance orders until the EPA brings an enforcement action in federal district court." *Id.* at A6 (citing cases). The court of appeals concluded that Section 309's structure, purposes, and history indicated that Congress intended to foreclose

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[3] The government is currently considering whether to file a civil enforcement action against petitioners. Absent a tolling agreement with petitioners, if the United States does not bring an enforcement action by April or May 2012—five years after the alleged discharges—the government may face the contention that, under Ninth Circuit precedent, its claims are barred by the general five-year statute of limitations for enforcement of civil fines, 28 U.S.C. 2462. See *FEC* v. *Williams*, 104 F.3d 237, 240 (1996), cert. denied, 522 U.S. 1015 (1997).

pre-enforcement review of compliance orders. *Id.* at A6-A9. The court explained that immediate judicial review of such orders would vitiate EPA's statutorily-conferred discretion either to issue a compliance order or to file a Section 309(b) enforcement action. *Id.* at A7.

The court of appeals further held that the Act's preclusion of pre-enforcement judicial review of compliance orders does not violate petitioners' due process rights. Pet. App. A10-A15. The court explained, *inter alia*, that "a [district] court cannot assess penalties for violations of a compliance order under § 1319(d) unless the EPA * * * proves, by a preponderance of the evidence, that the defendants actually violated the CWA in the manner alleged." *Id.* at A12.

The court of appeals also rejected petitioners' argument that, because compliance orders expose recipients to potential civil penalties, such orders effectively prevent recipients from seeking judicial review. Pet. App. A13-A15. Relying on *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 218 (1994), the court explained that statutory preclusion of pre-enforcement judicial review violates due process only when compliance is so onerous, and the penalties for noncompliance so coercive, as to have the practical effect of foreclosing access to the courts. Pet. App. A13. The court observed that the CWA permitting process enables regulated entities to obtain an agency determination as to the legality of proposed action—and judicial review of that determination—without incurring potential monetary liability. *Id.* at A13-A14. The court further explained that the amount of any civil penalty ultimately imposed under Section 309(d) would be determined by the court, based on factors specified in the CWA, "only after the [peti-

tioners] have had a full and fair opportunity to present their case in a judicial forum." *Id.* at A14-A15.

SUMMARY OF ARGUMENT

Petitioners deposited fill materials on their Priest Lake property without first seeking a Section 404 permit, a jurisdictional determination, or informal guidance from the Corps or EPA. EPA subsequently issued a compliance order to notify petitioners of its view that they were in violation of the CWA. The compliance order further advised petitioners that, unless they took specified measures to achieve prospective compliance with the Act, the agency might seek penalties and/or injunctive relief through a judicial enforcement action. Because the order imposed no new legal obligations beyond those to which petitioners were already subject under the CWA, it is not subject to immediate pre-enforcement review under the APA. And because the CWA provides ample procedural safeguards and alternative avenues of obtaining judicial review, petitioners have no constitutional right to bring a pre-enforcement challenge to the compliance order itself.

I. A Section 309(a)(3) compliance order (a) sets forth EPA's conclusion that the recipient is in violation of the CWA, and (b) identifies the measures that EPA believes are necessary to achieve prospective compliance with the Act. By statute, a compliance order cannot impose any legal obligations on the recipient beyond those imposed by the CWA. Such orders thus fall within the broad range of communications that agencies use to inform regulated parties of governing legal requirements and existing violations, to encourage voluntary compliance or remedial measures, and to initiate consultation between the agency and the regulated person. Courts

have widely recognized that, when agencies issue such communications, a recipient who disagrees with the government's legal or factual assessments generally has no right to immediate judicial resolution of the disagreement. A rule that broadly authorized immediate judicial review of such agency communications would ultimately disserve the interests of both the government and regulated parties, by discouraging interactive processes that can obviate the need for judicial action.

II. The compliance order at issue here is not reviewable under the APA.

A. The compliance order is not "final agency action." See 5 U.S.C. 704. A Section 309(a)(3) order marks only a step in EPA's decision-making process, not its consummation. The order invited petitioners to contact EPA if they believed that the allegations in the order were inaccurate or that the specified compliance measures were infeasible. Even if petitioners failed to implement the specified measures, moreover, they could be subjected to monetary sanctions for violating the order only if (a) EPA commenced a Section 309(b) enforcement action against petitioners, and (b) the court in that suit determined that petitioners had violated the CWA as well as the order. The order therefore did not have the kind of concrete legal consequences that generally are necessary to constitute "final agency action." See *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997); *FTC* v. *Standard Oil Co. of Cal.*, 449 U.S. 232, 239-243 (1980) (*Standard Oil*).

B. Even if the compliance order were "final agency action" within the meaning of the APA, petitioners could not obtain immediate judicial review because Congress's intent to preclude pre-enforcement review of compliance orders is "fairly discernible in the statutory scheme."

Block v. *Community Nutrition Inst.*, 467 U.S. 340, 351 (1984) (citation omitted); *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1994). When EPA determines that a discharger is in violation of the CWA, the Act authorizes the agency either to commence an enforcement action immediately or instead to seek to induce compliance by issuing a compliance order. EPA's discretion to determine when and whether suit should be filed, and its ability to use the compliance-order mechanism for its intended purpose, would be substantially undermined if compliance-order recipients could immediately hale the agency into court.

III. Petitioners have no constitutional right to immediate judicial review of EPA's compliance order. Petitioners cannot be subjected to civil penalties for violating the order unless and until a court determines that a CWA violation has occurred and considers the statutory factors bearing on the appropriate penalty amount. 33 U.S.C. 1319(d). Although the risk of civil-penalty liability might deter some persons from engaging in discharges that would not actually violate the CWA, that potential deterrent effect would exist even if EPA had not issued a compliance order because the Act itself imposes liability for unlawful discharges. Petitioners have no generalized constitutional entitlement to an advisory opinion assessing the legality of conduct in which they wish to engage. Petitioners, moreover, face a choice between complying with the order and defending against a possible enforcement action only because they discharged fill on their property without first seeking a permit or consulting with EPA or the Corps. If petitioners had sought a permit, they could have obtained a final agency determination on the question of CWA coverage,

and immediate judicial review of that determination, without exposing themselves to potential penalties.

ARGUMENT

I. A SECTION 309(a)(3) COMPLIANCE ORDER IS A MEANS OF PROVIDING REGULATORY GUIDANCE AND ENCOURAGING VOLUNTARY COMPLIANCE, RATHER THAN A SELF-EXECUTING ENFORCEMENT MEASURE, AND COURTS HAVE RECOGNIZED THAT SUCH AGENCY COMMUNICATIONS ORDINARILY SHOULD NOT BE SUBJECT TO PRE-ENFORCEMENT JUDICIAL REVIEW

A Section 309(a)(3) compliance order sets forth EPA's conclusion that a person is in violation of the CWA, and it identifies the measures that EPA believes are necessary to bring the recipient into compliance with the Act.[4] Such orders may obviate the need for judicial intervention, either by inducing voluntary implementation of the measures specified therein, or by triggering a process of consultation between the agency and the alleged violator that produces a mutually acceptable alternative resolution. Such orders are not self-executing, however, and they impose no binding requirements beyond those that already flow from the CWA itself. Section 309(a)(3) compliance orders therefore fall

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[4] Based on EPA's longstanding view that a violation of Section 404 of the CWA continues for as long as unlawfully discharged fill remains in covered waters, the agency concluded that removal of the fill and restoration of the site were necessary for petitioners to achieve prospective compliance with the Act. See note 2, *supra*. Implementation of the measures specified in the compliance order would not retroactively authorize the prior discharges or insulate petitioners from potential legal liability for those acts. Implementation of those measures would, however, influence EPA's discretionary decision whether to seek penalties for the earlier discharges.

within the broad range of communications that agencies use to inform regulated parties of governing legal requirements and warn them that failure to comply may result in an enforcement action.

A. 1. When EPA determines that a person is in violation of the CWA, Section 309(a)(3) provides the agency with two enforcement options. 33 U.S.C. 1319(a)(3). The agency may file suit under Section 309(b) to seek a judicial determination that the recipient has violated the CWA, an injunction requiring remediation, and appropriate civil penalties for each day of the violation. 33 U.S.C. 1319(a)(3), (b) and (d). Alternatively, EPA may "issue an order requiring such person to comply with" the Act. 33 U.S.C. 1319(a)(3).

A compliance order under Section 309(a)(3) typically states EPA's determination that the recipient is in violation of the CWA, and it identifies the measures the agency believes are necessary to achieve compliance going forward. If the recipient fails to implement the prescribed measures, however, EPA cannot take coercive steps to compel compliance with the order or assess monetary penalties for its violation. Rather, if EPA regards the recipient's response as unsatisfactory, its recourse is to file a civil action under Section 309(b).

In a Section 309(b) enforcement action—whether or not the suit is preceded by a compliance order—EPA must establish that the defendant has violated the CWA.[5] See, *e.g.*, *United States* v. *Deaton*, 332 F.3d 698,

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[5] In their petition for a writ of certiorari, petitioners contended that penalties can be assessed for violations of a CWA compliance order even if the relevant conduct does not violate the CWA. Pet. 16. Petitioners have correctly abandoned that argument in their brief on the merits. Section 309(b) of the CWA provides that EPA may "commence a civil action for appropriate relief * * * for any violation for which

701-702 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004). If the defendant in such a suit contends that the waters into which it discharged pollutants were not covered by the CWA, the court resolves the dispute between the parties on that issue without giving deference to any EPA factual determinations reflected in a prior compliance order. See Pet. App. A12; see also, *e.g.*, *United States* v. *Brace*, 41 F.3d 117, 124-129 (3d Cir. 1994) (considering compliance-order recipient's challenges to the agency's authority to regulate in the context of an enforcement action), cert. denied, 515 U.S. 1158 (1995); 33 U.S.C. 1319(b). If the court concludes that a violation has occurred, it then determines whether the requested injunctive relief is appropriate. See 33 U.S.C. 1319(b). If the agency seeks the civil penalties authorized by Section 309(d), the imposition of penalties (including the determination of the appropriate amount) is likewise entrusted to the court, based on its consideration of various factors set forth in the statute. 33 U.S.C. 1319(d). Thus, although compliance orders often identify the sanctions to which the recipient may be subject if it fails to comply with the order (see, *e.g.*, Pet. App. G7), those sanctions cannot actually be imposed unless EPA persuades a court that the defendant has violated the CWA and that the requested remedies are appropriate.

2. Petitioners are therefore incorrect in analogizing a compliance order to an "injunction," Br. 39, that "for-

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[the EPA] *is authorized* to issue a compliance order." Pet. App. A12 (emphasis added; brackets in original); 33 U.S.C. 1319(b). That language demonstrates that "EPA must bring an action alleging a violation of the CWA itself," and "a court cannot assess penalties for violations of a compliance order under [Section] 1319(d) unless the EPA also proves * * * that the defendants actually violated the CWA." Pet. App. A12.

bids the otherwise lawful use of the property," Br. 33 n.13. A crucial attribute of an injunction is that non-compliance with its requirements while it remains in effect may be punishable as contempt, even if the injunction is ultimately set aside on appeal. See, *e.g.*, *Walker* v. *City of Birmingham*, 388 U.S. 307, 315-320 (1967); *United States* v. *United Mine Workers of Am.*, 330 U.S. 258, 293-294 (1947). In that sense an injunction creates an independent legal barrier to the conduct it proscribes, over and above the pre-existing law(s) that the injunction is intended to enforce. By contrast, if the recipient of a compliance order fails to obey its directives, but the court in a subsequent EPA enforcement action determines that the recipient's conduct did not violate the CWA, the recipient cannot be punished for violating the order itself.[6]

Indeed, petitioners' prior course of conduct belies their current contention that an EPA compliance order has the legal effect of an injunction. Although petitioners briefly sought a TRO in the district court, they withdrew that request and did not seek a stay of the compliance order during the district-court proceedings. Petitioners did seek a stay of the order pending appeal in the Ninth Circuit, but the court of appeals denied that

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[6] Petitioners are also wrong in asserting (Br. 41) that a compliance order "can * * * initiate criminal proceedings." Criminal penalties may not be imposed for violating a compliance order, but rather can be imposed only for negligently or knowingly violating certain enumerated provisions of the CWA, for violating a permit, or for introducing certain substances into a sewer system. 33 U.S.C. 1319(c). With respect to a violation of the CWA that continues after a compliance order is issued, the defendant's receipt of (and non-compliance with) the order might be offered as evidence of the scienter required for criminal liability. See *ibid.* But many types of formal or informal agency warnings concerning ongoing violations could be used to the same effect.

request. Petitioners nevertheless do not assert, and the record does not suggest (and the government has no reason to believe), that they have removed the fill from their land or restored the site as the compliance order specifies. To be sure, petitioners have filed suit to contest the compliance order's validity. But if the compliance order actually had the legal effect of an injunction, the pendency of that challenge would not obviate petitioners' obligation to comply with the order unless and until it was stayed or set aside.

3. Rather than imposing *additional* obligations on regulated parties, administrative compliance orders issued pursuant to Section 309(a)(3) set forth EPA's views as to the steps particular persons must take to achieve prospective compliance with the CWA itself. By notifying regulated parties that EPA believes they are in violation of the Act, such orders may encourage recipients to implement corrective measures. In addition, Section 309(a)(3) compliance orders often invite the recipient to inform the agency if the regulated party disputes the finding of a violation or regards the specified corrective measures as infeasible. The order may thus trigger a process of consultation through which the recipient persuades EPA to accept compliance measures other than those specified in the original order. Either by persuading the recipient to adhere to its terms, or by initiating a consultative process that culminates in a different mutually acceptable resolution, a compliance order may obviate the need for a judicial enforcement action. And even in cases where the government ultimately seeks penalties for past violations, compliance orders may help regulated parties to limit their potential financial exposure, by identifying the measures that EPA views as

necessary to bring the violation (and thus the accrual of possible per-day penalties) to an end.

The compliance order at issue in this case was representative of wetlands-related orders. The order set forth EPA's "findings and conclusions" that petitioners had violated the CWA by placing fill in "jurisdictional" or "covered" wetlands without a permit. Pet. App. G1-G4. The order then stated that, in order to achieve compliance with the Act's requirements, petitioners should "remove all unauthorized fill material placed within [the] wetlands" and restore the site to its original condition. *Id.* at G4-G5. In a section entitled "SANCTIONS," the order provided "[n]otice" that "violation of, or failure to comply with, the foregoing Order may subject" petitioners to statutory penalties under Section 309(d) or a civil action under Section 309(b). *Id.* at G7.[7] The order further stated that petitioners were "encouraged to discuss any allegations herein which [petitioners] believe to be inaccurate or requirements which may not be attainable and the reasons why." *Id.* at G5-G6. The order stated that "[a]lternative methods to attain the objectives of this Order may be proposed" and that, "[i]f acceptable to EPA, such proposals may be incorporated into amendments to this Order." *Id.* at G6.

B. Administrative agencies routinely employ a wide range of formal and informal measures to inform regulated parties of the agency's view that they may be vio-

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[7] The compliance order in this case also referred to the possibility of an administrative penalty proceeding under Section 309(g) of the CWA, 33 U.S.C. 1319(g). See Pet. App. G7. Although Section 309(g) authorizes EPA to assess administrative penalties (subject to judicial review, see 33 U.S.C. 1319(g)(8)) for violations of the CWA itself, it does not authorize administrative penalties for violation of a Section 309(a)(3) compliance order. See 33 U.S.C. 1319(g)(1)(A).

lating the law. Although the reviewability of particular agency conduct depends on the circumstances and the statutory scheme at issue, such pre-enforcement opinions or warnings generally are not subject to immediate judicial review. In so holding, courts have applied various administrative-law doctrines, while agreeing on the essential principles: agencies frequently engage in notification, negotiation, and similar measures to induce voluntary compliance; such practices are beneficial to both agencies and regulated parties; and allowing immediate judicial review of these actions would ultimately be detrimental to both the government and the regulated community.

1. Many agencies issue letters or similar communications to inform a regulated party that the agency has found a violation, or is investigating a violation, and that enforcement measures may follow if the potential violation is not rectified. For example, the Food and Drug Administration (FDA) issues Warning Letters identifying violations "of regulatory significance" in order to "give individuals and firms an opportunity to take voluntary and prompt corrective action before [the FDA] initiates an enforcement action." FDA, *Regulatory Procedures Manual* § 4-1, http://www.fda.gov/ICECI/ComplianceManuals/RegulatoryProceduresManual/ucm176870.htm#SUB4-1-10. These letters explain the factual allegations supporting the violation, identify the corrective measures that must be taken by a specified date, and warn that "failure to achieve prompt correction may result in enforcement action without further notice." *Id.* § 4-1-10. Courts have held that those letters are not reviewable. See, *e.g.*, *Dietary Supplement Coal., Inc.* v. *Sullivan*, 978 F.2d 560, 563 (9th Cir. 1992) (not final agency action), cert. denied, 508 U.S. 906 (1993).

Other agencies utilize similar warning letters to notify companies of alleged violations and potential penalties, stating that failure to remedy the violations may result in enforcement action.[8] See, *e.g.*, *Air Cal.* v. *United States Dep't of Transp.*, 654 F.2d 616, 618-622 (9th Cir. 1981) (Federal Aviation Administration letter stating that failure to remedy violation "will warrant our pursuance of contractual, injunctive, and civil penalty remedies" was not final agency action); *Air Brake Sys. Inc.* v. *Mineta*, 357 F.3d 632, 638-646 (6th Cir. 2004) (National Highway Traffic Safety Administration opinion letters informing brake manufacturer that its products did not comply with agency standard were not final agency action).

An agency also may inform a regulated entity that the government may initiate an investigation or adjudication unless the party takes specified corrective action. The Consumer Products Safety Commission (CPSC), for instance, informs parties that it is considering making a preliminary determination that a product is hazardous, thereby triggering administrative proceedings, unless the party voluntarily corrects the issue. See 16 C.F.R. 1115.20; *Reliable Automatic Sprinkler Co.* v. *CPSC*, 324 F.3d 726, 731-732 (D.C. Cir. 2003) (*Reliable*) (not final agency action). The Equal Employment Opportunity

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[8] Other examples abound. The Department of Agriculture issues Official Warning Letters notifying parties of alleged Animal Welfare Act violations and warning that "any further infractions may result in more serious consequences such as a civil penalty or criminal prosecution." See http://www.aphis.usda.gov/animal_welfare/enforcement_types.shtml. The Department of Energy uses "enforcement letters" that notify contractors of violations and necessary remedial measures. See U.S. Dep't of Energy, Office of Enforcement, *Enforcement Process Overview* 23-24 (June 2009).

Commission (EEOC) utilizes similar communications to employers known as Letters of Determination. Such Letters state that the EEOC has reason to believe that the employer may have engaged in discrimination, and they invite the employer to take part in dispute resolution, subject to a potential enforcement suit if the matter is not resolved informally. See *AT&T* v. *EEOC*, 270 F.3d 973, 974-975 (D.C. Cir. 2001) (not final agency action); see also http://www.eeoc.gov/employers/process.cfm. The Securities and Exchange Commission issues "Wells notices," which inform a party that it is the target of an investigation and provide an opportunity to rebut the charges. See Enforcement Division, SEC, *Enforcement Manual* § 2.4 (2011).

More broadly, agencies issue innumerable letters and opinions setting forth their interpretation of the legal frameworks they administer, often in response to inquiries from regulated parties. See, *e.g.*, *City of San Diego* v. *Whitman*, 242 F.3d 1097, 1099-1100 (9th Cir. 2001) (letter from EPA Administrator responding to city's inquiry regarding EPA legal interpretation concerning future permit application was not "final agency action"); *Wilson* v. *Pena*, 79 F.3d 154, 161 (D.C. Cir. 1996) (EEOC letter explaining how it would calculate back pay was not final); *USAA Fed. Sav. Bank* v. *McLaughlin*, 849 F.2d 1505, 1508-1510 (D.C. Cir. 1988) (letter stating extent of regulatory jurisdiction, in response to inquiry, was not reviewable); *American Fed'n of Gov't Employees, AFL-CIO* v. *O'Connor*, 747 F.2d 748, 754-757 (D.C. Cir. 1984) (R.B. Ginsburg, J.) (Merit Systems Protection Board opinion letter was unripe for review), cert. denied, 474 U.S. 909 (1985).

2. The communications described above serve important administrative purposes, and their effectiveness

(and the agencies' willingness to employ them) would be substantially reduced if they were subject to immediate judicial review at the behest of a recipient or other dissatisfied private party. By interacting with regulated entities outside of more formal administrative-adjudication or judicial-enforcement settings, agencies can conserve resources and prioritize their enforcement efforts to respond to the most severe violations. See *AT&T*, 270 F.3d at 976. These interactions also provide benefits similar to those associated with administrative-exhaustion requirements, by giving agencies an opportunity to correct their own mistakes and to refine their views without the need for judicial intervention.

From the regulated party's perspective, such communications give recipients an opportunity to conform their conduct to the agency's guidance before being subjected to an enforcement action. To be sure, a regulated party that disagrees with the agency's view of the relevant law or facts may be uncertain whether to continue its ongoing conduct, risking eventual enforcement action and potential penalties, or to acquiesce in the agency's interpretation, thereby forgoing activities that a court might ultimately have determined to be lawful. See *Reliable*, 324 F.3d at 732-733 ("These consequences attach to any parties who are the subjects of Government investigations and believe that the relevant law does not apply to them."). In such situations, the regulated party might wish to seek immediate judicial review in order to clarify the legal status of its preferred course of conduct. Particularly when an agency simply states its understanding of existing legal requirements, however, regulated parties are not generally entitled to obtain pre-enforcement judicial review simply to gain certainty about the validity of an interpretation that the agency

might or might not seek to enforce in the future. Cf. *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 811 (2003) (rejecting argument that "mere uncertainty as to the validity of a legal rule constitutes a hardship for purposes of the ripeness analysis" because "courts would soon be overwhelmed with requests for what essentially would be advisory opinions").

The courts' general reluctance to review agency communications of that character serves the long-term interests of regulated parties as well as those of the government. That reluctance rests in part on the courts' recognition that, although pre-enforcement judicial review might sometimes assist private parties by clarifying their rights and obligations at an earlier point, "[t]o permit suits for declaratory judgments upon mere informal, advisory, administrative opinions might well discourage the practice of giving such opinions, with a net loss of far greater proportions to the average citizen than any possible gain which could accrue." *National Automatic Laundry & Cleaning Council* v. *Shultz*, 443 F.2d 689, 699 (D.C. Cir. 1971) (citation omitted). To be sure, EPA compliance orders differ in meaningful respects from some less formal agency communications, and the Court's analysis of the questions presented here should take account of those distinctions. See pp. 29-32, *infra*. The Court's analysis should also be guided, however, by the background principles described above, under which agency efforts to achieve voluntary compliance by warning alleged violators of their potential liability are not ordinarily viewed as proper objects of judicial scrutiny.

II. PETITIONERS MAY NOT OBTAIN PRE-ENFORCEMENT JUDICIAL REVIEW OF THE EPA COMPLIANCE ORDER PURSUANT TO THE ADMINISTRATIVE PROCEDURE ACT

A. The Compliance Order Is Not "Final Agency Action"

The compliance order issued to petitioners is not reviewable under the APA because it is not "final agency action." The APA authorizes judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. Two conditions must be met for agency action to be "final." *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997). "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Ibid.* (internal citations and quotation marks omitted). In determining whether a challenged agency action is final, this Court has "interpreted the 'finality' element in a pragmatic way." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149 (1967), abrogated on other grounds, 430 U.S. 99 (1977). Neither attribute of finality is present here.

1. EPA's issuance of the compliance order in this case did not represent the culmination of the agency's decision-making process. By its terms, the order's findings and conclusions with respect to the existence of a CWA violation were subject to alteration and revision through consultation with petitioners. Thus, the order invited petitioners to "engage in informal discussion of the terms and requirements of this Order" and to inform EPA of "any allegations herein which [petitioners] believe to be inaccurate." Pet. App. G5-G6. Similarly, al-

though the order described in mandatory terms the corrective actions that EPA believed were necessary to achieve prospective compliance with the CWA, it also invited petitioners to propose alternatives that could be incorporated as amendments to the order. *Id.* at G6. Because EPA indicated that the allegations and conclusions underlying the order were subject to revision based on any additional information that petitioners might provide, and that the prescribed corrective measures were subject to negotiation, the compliance order cannot properly be viewed as representing the agency's final conclusions. See *FTC* v. *Standard Oil Co. of Cal.*, 449 U.S. 232, 241 (1980) (where an administrative complaint initiated adjudicative proceedings, the complaint represented only a "threshold determination that further inquiry is warranted," whose allegations were not "definitive" because they could be challenged in the proceeding); see also, *e.g.*, *Phillips Petroleum Co.* v. *Lujan*, 963 F.2d 1380, 1387-1388 (10th Cir. 1992) (agency's request for information that provided party with opportunity to negotiate compliance was not final agency action, even though it alluded to the possibility of a later enforcement suit if negotiations were unsuccessful).

Petitioners contend (Br. 54-55) that the order represented the agency's final decision at least with respect to the CWA's applicability to the property at issue in this case. The order's invitation to contest its allegations, however, applies to all of the order's terms, including those relating to CWA coverage. See Pet. App. G5-G6; *id.* at G6 (stating that petitioners were "encouraged to discuss any allegations herein which [petitioners] believe to be inaccurate"). Although the compliance order reflected EPA's determination "for now that it has jurisdiction to regulate," *Reliable*, 324 F.3d at 731-732, the

agency also made clear that it was open to persuasion on all legal or factual issues implicated by the order.[9]

A variety of different regulatory outcomes would have been consistent with the terms of the compliance order. Responsive submissions by petitioners and further EPA investigation might have led the agency to conclude that the order was erroneously issued because petitioners' property is not covered by the CWA, or because the agency was mistaken as to the nature of petitioners' discharges. Negotiations between the parties could also have induced EPA to amend the order to incorporate alternative compliance measures proposed by petitioners. And even if petitioners had simply ignored EPA's invitation to propose alternative solutions, the government's decision whether to commence a judicial enforcement action would have entailed consideration of such factors as the severity of the violation, the need to seek an injunction compelling remedial measures, the appropriateness of seeking monetary penalties, and the proper allocation of the agency's resources. The compliance order itself did not commit the agency to any particular view concerning those discretionary considerations.[10]

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[9] EPA employs a variety of formal and informal mechanisms to communicate with regulated parties that the agency believes are or may be in violation of the CWA. Short of filing a lawsuit under Section 309(b), or seeking the assessment of administrative penalties pursuant to Section 309(g), issuance of a Section 309(a)(3) compliance order is the step that conveys the greatest degree of agency confidence that a CWA violation has in fact occurred. As the order in this case makes clear, however, Section 309(a)(3) compliance orders remain tentative in an important respect, as they allow recipients an opportunity to persuade the agency to rethink its views before judicial proceedings are initiated.

[10] Although the relative formality or informality of a particular agency communication is surely relevant to the question whether "final

By contrast, the filing of a Section 309(b) action seeking judicial enforcement of the CWA would have represented the consummation of EPA's decision-making process, effectively transferring responsibility for resolution of any disputed issues from the agency to the courts. The complaint in such a suit would have reflected EPA's considered conclusions, after any consultation with petitioners and further investigation, about the facts at issue, the CWA's application to those facts, the prospective relief that would best serve the Act's purposes, and the appropriateness of penalties. The filing of a complaint would also at least implicitly have reflected a determination that the pursuit of judicial relief in this case represented an appropriate expenditure of governmental resources. See, *e.g.*, *AT&T*, 270 F.3d at 975 ("[T]here clearly would be final agency action if the Commission filed a lawsuit against AT&T" because "[a]t that point the agency would have decided not only how it views AT&T's legal obligations, but also how it plans to act upon that view."). The compliance order here thus marks only a step in the process that might culminate in judicial enforcement, with substantial further deliberation necessary before the agency reaches the endpoint of its deliberations. See *Standard Oil*, 449 U.S. at 241-242.

2. The compliance order likewise is not a decision that determines legal rights or obligations or from which legal consequences flow.

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agency action" exists, it is not dispositive. The administrative complaint at issue in *Standard Oil* was a formal agency filing that triggered an adjudication before an administrative law judge. See 449 U.S. at 234-235. The Court nevertheless held that the complaint was not "final agency action" because additional steps were necessary before the agency's definitive position could be established. See *id.* at 241-242.

a. The order does not purport to impose substantive obligations beyond those imposed by the CWA, but instead "'expresse[s] [the agency's] view of what the law requires.'" *Fairbanks N. Star Borough* v. *United States Army Corps of Eng'rs*, 543 F.3d 586, 594 (9th Cir. 2008) (*Fairbanks*) (quoting *AT&T*, 270 F.3d at 975), cert. denied, 129 S. Ct. 2825 (2009). That limitation on the scope of permissible compliance orders follows directly from the text of Section 309(a)(3). That provision applies when EPA finds that a person "is in violation of" specified CWA provisions or existing permit requirements, and it authorizes EPA to "issue an order requiring such person to comply with" the relevant legal norm. 33 U.S.C. 1319(a)(3). Section 309(a)(3) does not authorize issuance of an administrative order if no violation has occurred, and it does not vest EPA with power to impose new obligations going beyond pre-existing law.

Before and after the order in this case was issued, petitioners therefore faced essentially the same legal regime and substantially the same risks. Petitioners' property was potentially subject to the CWA's restrictions; petitioners had already acted on their belief that the statute did not apply by depositing fill into the wetlands without first obtaining a permit; and petitioners were (or should have been) aware that they could be subject to an enforcement action under Section 309(b) if EPA disagreed with their view of the law or facts. Moreover, because the court in an enforcement action would give no deference to any factual determinations reflected in the compliance order, issuance of the order did not increase the likelihood that the government would prevail if an enforcement suit were filed. See Pet. App. A12.

Petitioners' primary objection to the compliance order is that it presented them with a Hobson's choice between forgoing development activities that they believed to be lawful, and potentially incurring substantial civil penalties if they proceeded with their development and a court ultimately found a violation of the CWA. But since the issuance of a compliance order is not a legal prerequisite to EPA's initiation of an enforcement suit, petitioners would have faced the same basic dilemma even if EPA had given no indication that it regarded their conduct as unlawful. To be sure, by informing recipients that EPA has focused on their activities and views them as illegal, compliance orders may affect recipients' assessments of the relative costs and benefits of alternative courses of action. In itself, however, that incentive does not create the sort of legal effect on a party's rights that can render agency action "final." See *Reliable*, 324 F.3d at 732-733; *National Ass'n of Home Builders* v. *Norton*, 415 F.3d 8, 13-16 (D.C. Cir. 2005) (incentive to comply voluntarily with agency's guidance is insufficient to establish legal consequences under *Bennett* when the underlying statutory violation would still have to be established in an enforcement action).

b. In two respects, compliance orders have potential consequences that go beyond simply informing recipients of EPA's views as to their existing obligations. Neither of those potential consequences, however, alters petitioners' legal rights in a manner that is sufficiently concrete or substantial to render the order "final agency action."

First, EPA's issuance of a compliance order could increase petitioners' civil-penalty exposure if EPA ultimately files an enforcement suit and petitioners are held liable. A person who violates the CWA may be subject

to civil penalties up to a specified amount for each day of the violation, whether or not a compliance order was issued. 33 U.S.C. 1319(d). When a compliance order has been issued, the CWA also authorizes the imposition of monetary penalties for violating the compliance order itself. See *ibid.*

As explained above, Section 309(a)(3) compliance orders are valid only to the extent that they accurately reflect the pre-existing requirements of the CWA. Thus, if a defendant were held to have violated a compliance order but not to have violated the Act, civil penalties would be unavailable, since the order would be invalid to the extent it proscribed otherwise-lawful conduct. If a court finds that particular conduct violated both the CWA and a valid compliance order, however, it can impose separate penalties for the two violations, and it could in theory impose a civil penalty that exceeded the statutory maximum for the statutory violation alone.

The amount of civil penalties to be imposed in a particular case, however, remains subject to the court's discretion. Because courts in dredge-or-fill cases rarely impose penalties in an amount that approaches the statutory maximum for a CWA violation, see, *e.g.*, *United States* v. *Scruggs*, No. G-06-776, 2009 WL 500608, at *3-*6 (S.D. Tex. Feb. 26, 2009), the possibility that a compliance order could ultimately result in penalties that exceed that maximum is speculative at best. That remote possibility—which is contingent on, *inter alia*, EPA's commencement of an enforcement action and a court's resolution of the suit in EPA's favor—provides no sound basis for distinguishing, for "final agency action" purposes, between Section 309(a)(3) compliance orders and the broad range of agency advisory actions that have consistently been held to be unreviewable.

See pp. 18-23, *supra*. To be sure, even in cases where the total civil penalty does not exceed the statutory maximum for the CWA violation itself, the imposition of separate penalties for a CWA violation and a violation of the compliance order will increase the defendant's total financial exposure. But even if EPA used a less formal communication to inform the recipient that the agency viewed its conduct as unlawful, a defendant who disregarded that warning and was ultimately found liable by a court could face greater penalties (within the statutory maximum) as a result. See 33 U.S.C. 1319(d) (court may consider, *inter alia*, "any good-faith efforts to comply with the applicable requirements" and "such other matters as justice may require"); cf. note 6, *supra*.

Second, EPA's issuance of a compliance order may complicate—but does not foreclose—the recipient's efforts to obtain an after-the-fact permit. Persons who discharge pollutants into covered waters, but who have not received compliance orders, generally may apply for after-the-fact permits from the Corps. If granted, such permits retroactively condone the otherwise-prohibited discharges that have already occurred. See 33 C.F.R. 326.3(e). In order to avoid interfering with EPA's enforcement prerogatives, the Corps' regulations provide that "when [the Corps] is aware of enforcement litigation that has been initiated" by other agencies—including, in the Corps' view, when EPA has issued a compliance order—"[n]o permit application will be accepted * * * unless [the Corps] determines that concurrent processing of an after-the-fact permit application is clearly appropriate." 33 C.F.R. 326.3(e)(1)(iv).

Although the Corps' general practice is not to entertain after-the-fact permit applications when compliance orders remain unresolved, the "clearly appropriate"

standard provides the agency with considerable discretion. Because the limitation on concurrent processing arises out of the agencies' desire for coordinated enforcement, the agencies are free to decide, after interagency consultation, see 33 C.F.R. 326.3(g), that the Corps may appropriately consider a particular compliance-order recipient's permit application. Moreover, even when the applicant for a Corps after-the-fact permit has not received an EPA compliance order, the Corps may decline to accept the permit application until the applicant has performed specified remedial measures. 33 C.F.R. 326.3(e)(1). In both contexts, the ultimate grant of the permit depends on whether the Corps concludes, after coordination with EPA where appropriate, that a permit would be consistent with the purposes of the CWA. 33 C.F.R. 326.3(e)(2). Thus, to the extent that an EPA compliance order may hinder the recipient's efforts to obtain an after-the-fact permit for past discharges, the burdens it imposes are not different in kind from those the applicant would otherwise face.

3. Petitioners contend (Br. 55-56) that EPA's compliance order constitutes "final agency action" under *Alaska Department of Environmental Conservation* v. *EPA*, 540 U.S. 461 (2004) (*ADEC*). Petitioners are incorrect.

ADEC concerned a mining company's compliance with the Clean Air Act (CAA) permitting scheme for construction of new facilities. The company had obtained a state permit allowing construction of a generator with certain emissions controls, which would ordinarily have been sufficient to comply with the CAA. Gov't Br. at 17, *ADEC*, *supra* (No. 02-658). EPA issued an order prohibiting construction, however, which "effectively invalidated" the state permit and enabled EPA

to seek significant penalties for the company's violation of both the CAA and the order itself. 42 U.S.C. 7413(a)(5) and (b)(3); see also 42 U.S.C. 7477. The compliance order was issued after extended interactions among EPA, the mining company, and the state permitting agency, and the order emphasized that EPA would not alter its terms unless circumstances changed. See *Alaska Dep't of Envtl. Conservation* v. *EPA*, 244 F.3d 748, 750 (9th Cir. 2001).

Although EPA initially argued that the order was not final, the court of appeals rejected that contention, and the government conceded in this Court that the order was "final agency action" because it "imposed 'new legal obligations on'" the mining company. See *ADEC*, 540 U.S. at 481 & n.10 (quoting Oral Argument Tr. 43-44). The Court agreed. That conclusion flowed both from the fact that the order represented the agency's final position on the construction barring post-order developments, and from the fact that its issuance altered the mining company's legal rights by changing what was arguably full compliance with the CAA—construction pursuant to a state permit—to a violation of the statute, see 42 U.S.C. 7413(b)(3). See *ADEC*, 540 U.S. at 483.

The *ADEC* Court's "final agency action" analysis focused on the terms of a particular compliance order and its role within the relevant statutory scheme; the Court did not announce a categorical rule governing all EPA compliance orders under all federal environmental laws. In contrast to the order at issue in *ADEC*, which was issued after consultations among the interested parties and made clear that EPA would not alter its terms unless circumstances changed, the compliance order in this case "encouraged" petitioners "to discuss any allegations herein which [petitioners] believe to be inaccu-

rate or requirements which may not be attainable." Pet. App. G6. The order also did not alter petitioners' obligations under the CWA or render otherwise-lawful actions unlawful. Rather, it simply informed petitioners that EPA believed they were in violation of the CWA, *id.* at G3; ordered petitioners to take specified steps to achieve compliance with the Act, *id.* at G4-G5; and identified the penalties to which petitioners might be subject in a potential enforcement action, *id.* at G7.

B. The CWA Precludes Pre-enforcement Judicial Review Of Administrative Compliance Orders

Even if the compliance order at issue here were "final agency action" within the meaning of the APA, petitioners could not seek immediate judicial review of the order because the CWA precludes pre-enforcement review. The APA authorizes judicial review of "final agency action," 5 U.S.C. 704, except to the extent that other "statutes preclude judicial review," 5 U.S.C. 701(a)(1). "Whether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review." *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1994) (citation omitted) (*Thunder Basin*); see *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 345 (1984); see also *United States* v. *Fausto*, 484 U.S. 439, 443-444 (1988). Although the Court applies a "strong presumption" that Congress did not intend to *foreclose* judicial review of agency action, that presumption is "not implicate[d]" where, as here, a statutory scheme simply channels or postpones judicial review until the conclusion of the agency's decision-making process. *Thunder Basin*, 510 U.S. at 207 n.8; see *Shalala* v. *Illinois Coun-*

cil on Long Term Care, Inc., 529 U.S. 1, 19-20 (2000) (When judicial review is merely postponed, any "presumption must be far weaker than a presumption against preclusion of all review in light of the traditional ripeness doctrine, which often requires initial presentation of a claim to an agency.").

Congress's intent to preclude pre-enforcement review of EPA compliance orders is "fairly discernible in the statutory scheme." *Block*, 467 U.S. at 351 (citation omitted); see *Thunder Basin*, 510 U.S. at 207; see also *Fausto*, 484 U.S. at 452. Section 309(a)(3) authorizes EPA either to file an enforcement action immediately or to issue a compliance order. EPA's ability to exercise the enforcement discretion conferred by Congress would be substantially undermined if compliance-order recipients could immediately hale the agency into court. Other aspects of the CWA's structure, history, and purposes reinforce the conclusion that Congress did not intend Section 309(a)(3) compliance orders to be subject to immediate review.

1. Various aspects of the CWA indicate that pre-enforcement judicial review of administrative compliance orders would be inconsistent with Congress's intent.[11]

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[11] Relying on 5 U.S.C. 559, petitioners contend (Br. 52) that immediate judicial review under the APA can be foreclosed only by express preclusive language in another law. See also APA Watch Amicus Br. 10; Mountain States Legal Found. Amicus Br. 7-13. This Court has consistently applied the *Block* framework, however, and has held that pre-enforcement review is precluded when congressional intent to do so is fairly discernible from the statutory structure, purpose, and legislative history, even in the absence of an express preclusion provision. *E.g.*, *Thunder Basin*, 510 U.S. at 207; *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 50-52 (1955). The Court has similarly applied ripeness principles even in the absence of statutory language expressly designating

First, when EPA determines that a regulated entity is in violation of the CWA, Section 309(a)(3) authorizes the agency either to proceed directly to court by filing a Section 309(b) civil action, or to issue an administrative compliance order. Which path to pursue is committed to EPA's discretion. See 33 U.S.C. 1319(a)(3) (EPA "shall issue an order * * * or * * * shall bring a civil action"); see also *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985) (enforcement decisions such as "whether the particular enforcement action * * * best fits the agency's overall policies" is committed to agency's absolute discretion).

A principal advantage of the compliance-order mechanism is that it may obviate the need for judicial intervention by inducing compliance with the CWA, either through implementation of the measures specified in the order, or through an alternative resolution to which EPA agrees after consultation with the recipient. EPA's statutory discretion to choose between the two enforcement mechanisms would be substantially undermined if compliance-order recipients could trigger an immediate judicial proceeding by seeking pre-enforcement review of the order itself. See *Hoffman Group, Inc.* v. *EPA*, 902 F.2d 567, 569 (7th Cir. 1990) (*Hoffman*) ("Congress gave the EPA two options under" Section 309(a)(3), and "judicial review of a compliance order before any enforcement suit is brought would eliminate this choice."). EPA would then be forced to litigate in court such issues as the applicability of the CWA to particular waters, the accuracy of the order's factual allegations, and the appropriateness of the chosen measures for achieving com-

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particular agency action as unripe for immediate review. See, *e.g.*, *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 732-737 (1998).

pliance, before the agency had determined whether a request for judicial enforcement represented a sound use of governmental resources. Cf., *e.g.*, *Chaney*, 470 U.S. at 831 (agency's decision whether to undertake enforcement action depends not only on "whether a violation has occurred," but also on such discretionary factors as "whether agency resources are best spent on this violation or another"); *AT&T*, 270 F.3d at 976 (immediate review of EEOC letter informing company of the possibility of enforcement action would "preempt the Commission's discretion to allocate its resources as between this issue and this employer, as opposed to other issues and other employers").

Such a proceeding, moreover, would not necessarily produce a definitive resolution of the contested issues. If CWA compliance orders are reviewable under the APA, they would ordinarily be reviewable under the APA's deferential "arbitrary [and] capricious" standard. See 5 U.S.C. 706(2)(A). A court's determination that a compliance order was not arbitrary and capricious—*i.e.*, that EPA *reasonably believed* that the recipient was in violation of the CWA—would not prevent the recipient from arguing, in a subsequent civil enforcement action, that its conduct did not *actually* violate the statute. Alternatively, courts might seek to pretermit such duplicative proceedings, either by requiring the government to prove an actual CWA violation in order to sustain the validity of the compliance order against the recipient's APA challenge, cf. *ADEC*, 540 U.S. at 493-494, or by treating the government's potential claims for civil penalties and injunctive relief as compulsory counterclaims (see Federal Rule of Civil Procedure 13) that will be forfeited unless they are asserted in the recipient's APA suit. Either of those approaches, however, would exac-

erbate the intrusion on EPA enforcement prerogatives that judicial review of compliance orders inherently entails, by allowing a compliance-order recipient to put EPA to an immediate decision whether to pursue an enforcement suit.

Second, Section 309(a)(3) compliance orders are not self-executing, but must instead be enforced in a plenary judicial action. By making the legal consequences of these compliance orders contingent on EPA's commencement and successful prosecution of a civil lawsuit, Congress further indicated that it viewed issuance of such orders as a step in the deliberative process that might lead to enforcement, rather than as a coercive sanction that itself must be subject to judicial review. 33 U.S.C. 1319(a)(3) and (b). And by providing that the order is enforceable only if it is supported by an underlying violation, 33 U.S.C. 1319(b), pp. 14-15, *supra*, Congress ensured that persons who are actually subjected to enforcement suits can raise all of their challenges to the orders in those proceedings. See *Hoffman*, 902 F.2d at 569.

Third, Congress expressly authorized immediate judicial review on the administrative record when EPA takes coercive action itself by assessing administrative penalties after a hearing. See 33 U.S.C. 1319(g)(8). Congress's express authorization of judicial review for administrative-penalty assessments, combined with the absence of any comparable authorization for review of compliance orders, reinforces the inference that Congress did not contemplate immediate review in the latter context. See *Fausto*, 484 U.S. at 448 (inferring that statute's failure to include class of employees in judicial-review provisions indicated that Congress intended to preclude review for that class); *United States* v. *Erika*,

Inc., 456 U.S. 201, 208 (1982) (noting that provision for judicial review of awards under one part of Medicare Act but not another indicated that no judicial review was available for awards under latter part); *Block*, 467 U.S. at 345-346.

2. The CWA's purposes and the compliance order's function within the CWA's enforcement framework further indicate that Congress intended to allow EPA to issue administrative compliance orders without being haled prematurely into court. A major impetus for the CWA was Congress's perception that the enforcement provisions of existing water-pollution laws were cumbersome and inefficient. See S. Rep. No. 414, 92d Cong., 1st Sess. 2, 5 (1971) (Senate Report) (describing existing law's provision for a years-long process of negotiation and hearings before the government could bring a civil enforcement action). In the CWA, Congress "delete[d] the cumbersome conference and hearing procedures in the existing law" that had "contribute[d] to delay." *Id.* at 5, 64. Congress then gave EPA its current enforcement options, emphasizing that EPA was to act expeditiously to remedy violations. See *id.* at 64; see also *Southern Pines Assocs.* v. *United States*, 912 F.2d 713, 716 (4th Cir. 1999).

The CWA's compliance-order provisions serve the statutory purposes by providing a means of notifying recipients of potential violations and quickly resolving the issues through voluntary compliance. That course conserves agency and judicial resources for the most severe violations and avoids the potential delays of a judicial enforcement action. Treating compliance orders as immediately reviewable would create a significant disincentive to their use by forcing EPA to consider, before issuing each order, whether it is willing to be im-

mediately drawn into litigation. That disincentive would hinder the agency's ability to inform the public of the Act's requirements and to work with regulated parties to mitigate any noncompliance. The function of compliance orders within the statutory scheme thus confirms Congress's intent that such orders should not be immediately reviewable. See *Morris* v. *Gressette*, 432 U.S. 491, 501-503 (1977) (holding that the nature of Voting Rights Act's preclearance proceeding, and in particular its function of providing expeditious review by the Attorney General, indicated that Congress intended the Attorney General's determination not to be reviewable); *NLRB* v. *United Food & Commercial Workers Union Local 23*, 484 U.S. 112, 132 (1987) (holding that the National Labor Relations Act impliedly precludes judicial review of decision to settle with an employer after an administrative complaint is filed, in part because such review would hinder expeditious resolution of claims and decrease employer's willingness to settle).

3. Petitioners argue (Br. 47, 49) that other environmental statutes—the Clean Air Act (CAA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—support the inference that Congress intended CWA compliance orders to be immediately reviewable. Petitioners are incorrect.

First, petitioners argue (Br. 49) that, because Congress modeled Section 309 on the enforcement provisions in the CAA, see Senate Report 63-64, and because this Court reviewed a CAA compliance order in *ADEC*, CWA compliance orders must likewise be reviewable. Unlike the CWA, however, the CAA was amended in 1977 to authorize judicial review of all "final action[s]," thus making clear that the statute does not preclude review of any action that is final under *Bennett*. Pub. L.

No. 95-95, Tit. III, § 305, 91 Stat. 772-777 (codified as amended at 42 U.S.C. 7607(b)(1)). And while the Court in *ADEC* held that the challenged CAA order was final, see *ADEC*, 540 U.S. at 483, that order differed in significant respects from the compliance order at issue in this case. See pp. 32-34, *supra*. Because the reviewability of a particular compliance order depends on the terms of the order and its role within the overall statutory scheme, the decision in *ADEC* is not controlling here.

Petitioners also argue (Br. 41) that the CAA's grant of authority to issue immediately effective emergency compliance orders, 42 U.S.C. 7603, indicates that Congress believed that judicial review of ordinary compliance orders in the CWA would not undermine their purposes. But Congress's grant of emergency powers to address the imminent-endangerment situations that can arise from the types of pollution that the CAA addresses does not raise any inference about CWA compliance orders.

Second, petitioners argue (Br. 47) that, because Congress amended CERCLA in 1986 to preclude judicial review of unilateral administrative orders under that Act, Pub. L. No. 99-499, Tit. I, § 113(c)(2), 100 Stat. 1649 (42 U.S.C. 9613(h)), the absence of any comparable CWA provision indicates that CWA compliance orders are reviewable. Congress's subsequent amendment of a different statute, however, is a poor basis for inferring Congress's intent in enacting the CWA. See, *e.g.*, *Massachusetts* v. *EPA*, 549 U.S. 497, 530 n.27 (2007).

4. Finally, requiring petitioners to challenge EPA's compliance order in the context of an enforcement suit does not deprive them of meaningful judicial review. See *Thunder Basin*, 510 U.S. at 207. Petitioners' complaint alleged that the compliance order is inconsistent

with the CWA because the property on which they discharged fill was not covered by the Act. See J.A. 13. That argument can be raised in response to any EPA enforcement suit under Section 309(b), and it can be "meaningfully addressed" by the district court in that proceeding. *Thunder Basin*, 510 U.S. at 215 (holding that meaningful review was available because company's constitutional challenge to agency action could be adjudicated in petition for review of eventual agency enforcement action).[12]

Petitioners do not dispute that the court in any EPA enforcement suit could entertain their contention that the property at issue is not covered by the CWA. Petitioners argue, however, that review in that context would be inadequate because petitioners must "risk[] * * * immense liability" in order to preserve the question for resolution in that setting. Br. 36-37. If petitioners perceive a risk of ultimate financial liability, however, it can only be because they are less than fully confident that a court would agree with their position on the issue of CWA coverage. Even if EPA had not issued a compliance order, that uncertainty would have created a disincentive to petitioners' contemplated development activities; yet petitioners would have had no right to an advisory judicial opinion as to the legality of their contemplated discharges. To be sure, the compliance order was likely to affect (and was intended to affect) petition-

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[12] Petitioners contend (Br. 36) that *Thunder Basin* is inapposite because the mining company in that case could initiate the administrative review process that would eventually culminate in judicial review, thereby limiting its exposure to daily penalties. That is a difference only in degree, however, as the company faced mounting exposure during the administrative process, the duration of which was not under the company's control. 510 U.S. at 205-206 & n.6.

ers' assessment of the respective costs and benefits of alternative courses of action. But a wide range of agency communications having analogous effects have been held not to be subject to immediate judicial review. See pp. 18-23, *supra*.

Petitioners' reliance (Br. 36-37) on *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 130 S. Ct. 3138 (2010), is also misplaced. The plaintiffs in *Free Enterprise Fund* sought to challenge the constitutionality of the agency itself, separate and apart from any specific agency action or threat of enforcement. *Id.* at 3150. In rejecting the government's argument that the statutory procedures for reviewing sanctions imposed by the Board precluded district-court review of the plaintiffs' constitutional claim, the Court observed that the plaintiffs "object[ed] to the Board's existence, not to any of its auditing standards," and that their "general challenge to the Board [wa]s 'collateral' to any [Securities and Exchange] Commission orders or rules from which review might be sought." *Ibid.* The Court also stated that the plaintiffs should not be required to commit a violation of law simply to "*incur* a sanction" that they could then use to "win access to a court of appeals." *Id.* at 3150-3151. Here, by contrast, petitioners do not challenge EPA's existence; they instead allege that the particular wetlands into which they discharged fill are not covered by the CWA. See J.A. 13. Courts routinely decide such issues in the course of adjudicating EPA enforcement actions. And unlike the plaintiffs in *Free Enterprise Fund*, petitioners have already committed acts that have exposed them to potential enforcement action.

McNary v. *Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991) (see Pet. Br. 45), is inapposite for similar rea-

sons. In *McNary*, this Court held that statutory provisions authorizing judicial review of individual deportation decisions did not preclude an action raising constitutional challenges to general Immigration and Naturalization Service policies. Requiring such claims to be brought in the context of petitions for review of individual deportation orders would effectively foreclose all judicial review, the Court explained, in part because the plaintiffs' constitutional claims required presentation of additional evidence beyond that contained in the administrative record of any deportation proceeding. 498 U.S. at 492, 496-497. The Court also characterized the plaintiffs' general constitutional challenge as "collateral" to any determination regarding a particular alien's immigration status. *Id.* at 492. Here, by contrast, petitioners' contention that the CWA does not cover their property is precisely the sort of claim that landowners often raise in response to EPA enforcement actions, and petitioners will be able to proffer any relevant evidence in the district court.

III. THE DUE PROCESS CLAUSE DOES NOT ENTITLE PETITIONERS TO PRE-ENFORCEMENT REVIEW OF THE COMPLIANCE ORDER

Petitioners contend that the issuance of the compliance order deprived them of constitutionally protected interests without a hearing. Petitioners further argue that they have a constitutional right to immediate review because they would be forced to risk severe penalties in order to preserve their challenges for judicial consideration in a possible EPA enforcement suit. Those contentions lack merit.

A. The Issuance Of The Compliance Order Did Not Subject Petitioners To A Pre-Hearing Deprivation

For the first time in this Court, petitioners contend that the issuance of the compliance order deprived them of constitutionally protected interests—namely, the economically viable use of their property, the right to exclude others from the property, and the right to be free from unreasonable searches—without a pre-deprivation hearing. Br. 17-19. Petitioners did not raise that argument in the lower courts or present it in their petition for a writ of certiorari, and the Court therefore should not consider it. In any event, the issuance of the compliance order did not deprive petitioners of any property interest.

Petitioners assert that the compliance order deprived them of any economically viable use of their property by rendering their property "a conservation preserve." Br. 18. That characterization misapprehends the effect of the order. Petitioners' ability to discharge fill free of federal restrictions turns on whether the CWA applies to the property at issue. If it does, petitioners were legally obligated to comply with the Act's requirements even before the compliance order was issued. Although the order apprised petitioners of EPA's view that their property contained wetlands protected by the Act, and warned them that failure to comply could lead to enforcement proceedings, it did not impose any additional legal restriction on petitioners' use of their land beyond those already imposed by the CWA. See pp. 13-18, *supra*. Nor did the order impose a lien or any other self-enforcing restraint on petitioners' property. Cf. *Connecticut* v. *Doehr*, 501 U.S. 1, 12 (1991) ("[A]ttachments, liens, and similar encumbrances * * * merit due process protection.").

Like a wide range of agency communications warning regulated parties that they are or may be in violation of the law, the compliance order created a practical disincentive to continued development of petitioners' land. Such warnings, however, do not deprive their recipients of any constitutionally protected property interest. Treating such warnings as constitutional deprivations would deter diverse formal and informal agency communications that serve the interests of the government, the general public, and the regulated parties themselves.

The other alleged deprivations to which petitioners point—denial of petitioners' right to exclude EPA representatives from their property and to be free from unreasonable searches and seizures of records—are similarly illusory. In providing that EPA may inspect petitioners' property, the compliance order simply restates Section 308's provision that EPA may enter onto property and require the provision of certain information "[w]henever required to carry out" the CWA. 33 U.S.C. 1318(a); see Pet. App. G1 (noting that compliance order was issued pursuant to 33 U.S.C. 1318 and 1319(a)); J.A. 18. That provision does not purport to supersede applicable constitutional requirements. Thus, to the extent that a particular entry onto petitioners' land would otherwise require a judicial warrant, the compliance order does not authorize EPA officials to dispense with that safeguard. Because the issuance of the order did not deprive petitioners of any protected interest, EPA was not, as petitioners argue, Br. 19-23, required to afford petitioners a prompt post-deprivation hearing. Cf. *FDIC* v. *Mallen*, 486 U.S. 230, 240 (1988).

B. Because The CWA Contains Constitutionally Adequate Procedural Safeguards Before Petitioners May Be Subject To Penalties, The Due Process Clause Does Not Require Pre-enforcement Review Of Compliance Orders

Petitioners contend that the threat of allegedly coercive civil penalties arising from the issuance of the compliance order impermissibly forces them to choose between complying with the order, thereby forgoing a judicial determination of whether their wetlands are subject to the CWA, or risking severe penalties. See Br. 23-32. To the contrary, the CWA provides extensive safeguards to ensure that any penalties to which petitioners might eventually be subject would not be "ruinous." Br. 54. Petitioners, moreover, face a dilemma largely of their own making, since they discharged fill into wetlands without first seeking a permit or consulting with EPA or the Corps. In any event, petitioners would have been subject to a potential civil enforcement action even if EPA had not first issued a compliance order or otherwise alerted them that it viewed their conduct as unlawful. By apprising petitioners of the measures that EPA viewed as necessary to achieve compliance, the order gave petitioners a significant opportunity that they would not have received if EPA had simply continued to scrutinize their activities and to deliberate internally regarding the advisability of an enforcement suit.

1. a. In contending that the potential penalties for violating the CWA are so coercive as to foreclose judicial review, petitioners rely primarily on *Ex parte Young*, 209 U.S. 123 (1908).[13] In *Young*, the Court considered

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[13] Petitioners apparently have abandoned the due process argument that they pressed below and in their petition for a writ of certiorari, namely, that the CWA's judicial-review framework denies them due

the constitutionality of state laws that imposed mandatory penalties for charging certain railroad freight rates. *Id.* at 127-128. A company could obtain review of those laws only by disobeying them and risking substantial automatic penalties if it did not prevail. *Id.* at 145-146. The Court held the laws unconstitutional, reasoning that the burden of automatic penalties was so severe that the laws effectively "preclude[d] a resort to the courts * * * for the purpose of testing [their] validity." *Id.* at 146-148.

Since *Young*, the Court has clarified that statutes imposing fines for non-compliance with a regulatory requirement are constitutional as long as imposition of penalties is not automatic but instead is subject to a "good faith" defense, judicial discretion, or plenary review. See *Thunder Basin*, 510 U.S. at 218 (finding no constitutional violation where penalty assessment became payable only after full review by an administrative body and federal court of appeals); *Reisman* v. *Caplin*, 375 U.S. 440, 446-447 (1964) (statute creating penalties for failure to respond to summons did not violate *Young* where penalty provision "d[id] not apply where the witness appears and interposes good faith challenges to the summons"); *Yakus* v. *United States*, 321 U.S. 414, 437-438 (1944) (no denial of due process where statute provided an opportunity to test the validity of regulations without necessarily incurring penalties).

This case differs from *Young* in another respect as well. The plaintiffs in *Young* sought to challenge state statutes and administrative orders that *changed* the applicable law by establishing new (and allegedly unrea-

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process because penalties can be assessed for violations of a CWA compliance order even if no violation of the Act itself has occurred. Pet. 16; see note 5, *supra*.

sonable) rates for railway service. See 209 U.S. at 130-131. The compliance order at issue here, by contrast, does not purport to subject petitioners to new legal obligations, but simply sets forth EPA's view of the duties to which petitioners were already subject under the CWA. This Court's decisions do not suggest that regulated parties have a constitutional right to immediate judicial review of agency pronouncements of that character.

b. Accordingly, a statute may constitutionally preclude pre-enforcement judicial review of administrative orders so long as it contains sufficient pre-penalty safeguards to ensure that the "practical effect of coercive penalties for noncompliance [is not] to foreclose all access to the courts." *Thunder Basin*, 510 U.S. at 218. The CWA's enforcement framework ensures that petitioners would not be effectively precluded from putting EPA to its burden of establishing a CWA violation in court.

First, any penalty against petitioners will be imposed only after plenary review of EPA's allegations regarding the underlying violation of the CWA and, if the court finds a violation, the exercise of judicial discretion regarding the appropriate amount of penalties. 33 U.S.C. 1319(d). The CWA currently exposes regulated parties to civil penalties of up to $37,500 per day for violations of the Act, 33 U.S.C. 1319(d); 40 C.F.R. 19.4, and EPA may seek up to the same amount in additional penalties for violation of a compliance order. The amount of penalties to be awarded in an enforcement suit, however, is determined by the court after consideration of several statutory factors. Those factors include the seriousness of the statutory violation, any good-faith efforts to comply with the applicable requirements, the economic im-

pact of the penalty on the violator, and any other relevant equitable considerations. 33 U.S.C. 1319(d).

When courts in dredge-or-fill cases impose penalties after considering these factors, they often award far less than the statutory maximum.[14] By identifying a broad range of factors as potentially relevant to the penalty calculation, Section 309(d) ensures that a violator will be subject to penalties only in an amount that the court finds appropriate after considering all of the equities.[15] Cf. *Thunder Basin*, 510 U.S. at 218 (stating that although statutory civil penalties "may become onerous if petitioner chooses not to comply," there is no "constitutionally intolerable" choice because civil penalties "become final and payable only after full review" by a federal court).

Second, after receiving the compliance order, petitioners could have asked the Corps to consider possible issuance of an after-the-fact permit. 33 C.F.R. 326.3(e).

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[14] See, *e.g.*, *Scruggs*, 2009 WL 500608, at *3-*6 (concluding that "a severe penalty is not appropriate" based on analysis of the defendant's ability to pay, the lack of economic benefit from the violation, and the relatively low severity of the violation; awarding $65,000 when the statutory maximum exposure was $1.3 million); *United States* v. *Bay-Houston Towing Co.*, 197 F. Supp. 2d 788, 823 (E.D. Mich. 2002) (declining to award penalties in view of party's efforts to obtain a permit in good faith).

[15] Petitioners assert (Br. 19-21) that EPA can allow potential penalties to accrue before filing suit, subject only to a five-year statute of limitations. See 28 U.S.C. 2462. In determining the amount of the penalty, however, the court may take into account any undue delay by EPA in pursuing enforcement action. See *Lloyd A. Fry Roofing Co.* v. *EPA*, 554 F.2d 885, 891 (8th Cir. 1977). In any event, if EPA wished to maximize potential penalties in a particular case by sandbagging a landowner in the manner petitioners suggest, it presumably would not alert the regulated entity to its risk of CWA liability by issuing a compliance order.

Such a permit would have retroactively approved the discharges in which petitioners had previously engaged, thereby insulating petitioners from potential CWA liability. See pp. 31-32, *supra*. In the course of the permitting process, petitioners could have raised their argument that the CWA does not apply to their land. When the Corps denies a permit, or issues a permit subject to conditions that the applicant opposes, the applicant may seek judicial review of that decision, including any determination about whether the wetlands on its property are covered by the Act. See 33 U.S.C. 1344(a); 5 U.S.C. 704; 33 C.F.R. 331.10, 331.12; see also *Precon Dev. Corp. v. United States Army Corps of Eng'rs*, 633 F.3d 278, 287-297 (4th Cir. 2011) (reviewing Corps' determination regarding CWA coverage in the context of suit challenging the jurisdictional determination and subsequent permit denial). Petitioners also could have engaged in the informal discussions that EPA's compliance orders invite, which might have avoided the need for judicial review.

c. Despite those safeguards, petitioners contend (Br. 28-32) that Section 309's framework is constitutionally inadequate under *Thunder Basin* because the CWA does not permit them to initiate an action for judicial review of the compliance order while complying with its terms. As petitioners observe, the Mine Act framework that the Court approved in *Thunder Basin* permitted the regulated party to initiate an administrative-review process that would ultimately lead to judicial review, even if the party had complied with the agency's directive. 510 U.S. at 207-208, 216-217. The Court did not suggest, however, that this opportunity is an essential prerequisite to a constitutional administrative-review framework. Rather, the Court emphasized that the ulti-

mate question is whether the framework presents the "constitutionally intolerable" choice condemned in *Young*. *Id.* at 217-218. In concluding that the Mine Act did not create such an impermissible choice, the Court relied in part on the fact that "the Secretary's penalty assessments become final and payable only after full review by both the Commission and the appropriate court of appeals." *Id.* at 218; see *Reisman*, 375 U.S. at 447 (upholding summons on the ground that if recipient refused to comply, he would have a good-faith defense before penalties could be imposed). The same is true here.

2. Petitioners' due process argument also ignores the fact that petitioners' current dilemma is largely of their own making. By seeking a permit *before* discharging pollutants on their land, petitioners could have obtained agency guidance and judicial review of whether the CWA covers their property, without exposing themselves to any potential penalties. The CWA is premised on a comprehensive permit system that provides a "means of achieving and enforcing" the Act's discharge limitations. *EPA* v. *California*, 426 U.S. 200, 205 (1976). The Act is therefore designed to encourage regulated parties to seek permits, and to obtain judicial review of permitting decisions, before they discharge pollutants. Petitioners could have applied for a permit, argued to the agency that no permit was actually required because the Act did not apply, and then sought APA review of the permitting decision and any associated jurisdictional determinations. See, *e.g.*, *Precon Dev. Corp.*, *supra*; see also 33 U.S.C. 1344(a); Pet. App. A13-A14. Even if the Corps had decided to grant the permit, petitioners could have challenged the underlying jurisdictional determination in court after exhausting their administrative reme-

dies. See *Baccarat Fremont Developers, LLC* v. *United States Army Corps of Eng'rs*, 425 F.3d 1150, 1152-1158 (9th Cir. 2005); 33 C.F.R. 331.5, 331.12.

Although petitioners argue (Br. 30-31) that the permitting process is burdensome, they have not established that the procedure is so onerous as to foreclose resort to it. Cf. *West Va. Highlands Conservancy, Inc.* v. *Huffman*, 625 F.3d 159, 169-170 (4th Cir. 2010) (noting that Congress considered the costs of a permitting system before deciding that "a permitting scheme is the crucial instrument for protecting natural resources").[16] In addition, the Corps has a shorter, less costly process whereby a potential discharger can request an informal or formal determination of whether particular waters, including wetlands, are covered by the CWA. See 33 C.F.R. 331.2 (jurisdictional determination). If petitioners had invoked that process before they removed the wetland soils on their property and replaced them with fill, they would have had the benefit of the agency's

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[16] Petitioners and their amici assert that the average cost of applying for an individual permit is more than $271,000. See Br. 30; Alaska, *et al.* Amicus Br. 10. Even assuming that average figure is accurate, however, it significantly overstates the costs associated with smaller parcels of affected wetlands like that at issue here. The study on which petitioners rely, Br. 30, states that the average cost is (in 2002 dollars) $43,687 plus $11,797 per affected acre. David Sunding & David Zilberman, *The Economics of Environmental Regulation By Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 74 (2002). Many persons seeking permits associated with smaller parcels of land, moreover, may be able to avail themselves of nationwide permits, such as "Nationwide Permit 29," which covers residential developments with up to .5 acres of affected wetlands. See http://www.usace.army.mil/CECW/Documents/cecwo/reg/nwp/NWP_29_2007.pdf. In many circumstances, persons may undertake activities authorized by a nationwide permit without prior notice to the Corps. 33 C.F.R. 330.1(e).

views on the CWA's applicability, and they could have sought judicial review of any subsequent permitting decision that was premised on that coverage determination. See, *e.g.*, *Fairbanks*, 543 F.3d at 594 & n.9. To the extent that petitioners regard their current range of options as unpalatable, the problem results from their own prior conduct, not any constitutional defect in the Act.

3. Finally, this Court's resolution of petitioners' due process claim should reflect an awareness that regulated parties have no general constitutional right to advisory judicial opinions when the existence of legal uncertainty presents them with difficult practical choices. Even if EPA had never issued a compliance order, petitioners would (or should) have been aware that their filling of wetlands subjected them to at least the possibility of an EPA enforcement action. Petitioners could have responded to that possibility by (a) removing the fill and restoring the site to minimize the likelihood of an enforcement suit; (b) initiating consultation with EPA and/or the Corps in an effort to develop a mutually acceptable solution; or (c) continuing to act on the assumption that the CWA did not apply to their discharges, and asserting that position in response to any EPA enforcement suit. Although EPA's issuance of the compliance order understandably affected petitioners' assessment of the relative advantages and disadvantages of the various alternatives, it did not reduce the range of available options. To treat the compliance order as triggering a constitutional right to immediate judicial review, where no immediate right of access to the courts had previously existed, would deter a broad range of beneficial agency communications.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall be * * * deprived of life, liberty, or property, without due process of law * * * .

2. 33 U.S.C. 1311(a) provides:

Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

3. 33 U.S.C. 1319 provides in pertinent part:

Enforcement

(a) State enforcement; compliance orders

* * * * *

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title * * * he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

* * * * *

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

* * * * *

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State,,[1] or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or

---

[1] So in original.

violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

* * * * *

(g) Administrative penalties

(1) Violations

Whenever on the basis of any information available—

(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the "Secretary") finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary,

the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

* * * * *

(5) Finality of order

An order issued under this subsection shall become final 30 days after its issuance unless a petition for judicial review is filed under paragraph (8) or a hearing is requested under paragraph (4)(C). If such a hearing is denied, such order shall become final 30 days after such denial.

* * * * *

(8) Judicial review

Any person against whom a civil penalty is assessed under this subsection or who commented on the proposed assessment of such penalty in accordance with paragraph (4) may obtain review of such assessment—

(A) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or

(B) in the case of assessment of a class II civil penalty, in United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business,

by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or the Secretary, as the case may be, and the Attorney General. The Administrator or the Secretary shall promptly file in such court a certified copy of the record on which the order was issued. Such court shall not set aside or

remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion and shall not impose additional civil penalties for the same violation unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion.

* * * * *

4. 33 U.S.C. 1344 provides in pertinent part:

Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

* * * * *

5. 33 C.F.R. 326.3 provides in pertinent part:

Unauthorized activities

* * * * *

(d) *Initial corrective measures.* (1) The district engineer should, in appropriate cases, depending upon the nature of the impacts associated with the unauthorized, completed work, solicit the views of the Environmental Protection Agency; the U.S. Fish and Wildlife Service; the National Marine Fisheries Service, and other Federal, state, and local agencies to facilitate his decision on what initial corrective measures are required. If the district engineer determines as a result of his investigation, coordination, and preliminary evaluation that initial corrective measures are required, he should issue an appropriate order to the parties responsible for the violation. In determining what initial corrective measures are required, the district engineer should consider whether serious jeopardy to life, property, or important public resources (see 33 CFR 320.4) may be reasonably anticipated to occur during the period required for the ultimate resolution of the violation. In his order, the district engineer will specify the initial corrective measures required and the time limits for completing this work. In unusual cases where initial corrective measures substantially eliminate all current and future detrimental impacts resulting from the unauthorized work, further enforcement actions should normally be unnecessary. For all other cases, the district engineer's order should normally specify that compliance with the order will not foreclose the Government's options to initiate appropriate legal action or to later require the submission of a permit application.

(2) An order requiring initial corrective measures that resolve the violation may also be issued by the district engineer in situations where the acceptance or processing of an after-the-fact permit application is prohibited or considered not appropriate pursuant to § 326.3(e)(1)(iii) through (iv) below. However, such orders will be issued only when the district engineer has reached an independent determination that such measures are necessary and appropriate.

(3) It will not be necessary to issue a Corps permit in connection with initial corrective measures undertaken at the direction of the district engineer.

(e) *After-the-fact permit applications.* (1) Following the completion of any required initial corrective measures, the district engineer will accept an after-the-fact permit application unless he determines that one of the exceptions listed in subparagraphs i-iv below is applicable. Applications for after-the-fact permits will be processed in accordance with the applicable procedures in 33 CFR parts 320 through 325. Situations where no permit application will be processed or where the acceptance of a permit application must be deferred are as follows:

(i) No permit application will be processed when restoration of the waters of the United States has been completed that eliminates current and future detrimental impacts to the satisfaction of the district engineer.

(ii) No permit application will be accepted in connection with a violation where the district engineer determines that legal action is appropriate (§ 326.5(a)) until such legal action has been completed.

(iii) No permit application will be accepted where a Federal, state, or local authorization or certification, required by Federal law, has already been denied.

(iv) No permit application will be accepted nor will the processing of an application be continued when the district engineer is aware of enforcement litigation that has been initiated by other Federal, state, or local regulatory agencies, unless he determines that concurrent processing of an after-the-fact permit application is clearly appropriate.

* * * * *

(g) *Coordination with EPA.* In all cases where the district engineer is aware that EPA is considering enforcement action, he should coordinate with EPA to attempt to avoid conflict or duplication. Such coordination applies to interim protective measures and after-the-fact permitting, as well as to appropriate legal enforcement actions.

REPLY BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
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No. 10-1062

In the
Supreme Court of the United States

CHANTELL SACKETT and MICHAEL SACKETT,
Petitioners,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
and LISA P. JACKSON, Administrator,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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10

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. DUE PROCESS REQUIRES THAT THE SACKETTS BE AFFORDED PROMPT JUDICIAL REVIEW OF THE COMPLIANCE ORDER 2

II. THE CLEAN WATER ACT DOES NOT PRECLUDE REVIEW OF THE COMPLIANCE ORDER UNDER THE ADMINISTRATIVE PROCEDURE ACT 9

III. THE COMPLIANCE ORDER IS FINAL AGENCY ACTION 14

A. The Compliance Order Is the Culmination of EPA's Decisionmaking 15

B. The Compliance Order Creates Numerous Legal Effects 18

1. The Compliance Order Imposes Additional Liability 19

2. The Compliance Order Imposes Additional Legal Obligations 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

Alaska v. U.S. EPA,
244 F.3d 748 (9th Cir. 2001).. . . . . 17, 19, 22

Am. Canoe Ass'n v. Murphy Farms, Inc.,
412 F.3d 536 (4th Cir. 2005).. 7

Am. Petroleum Inst. v. U.S. EPA,
906 F.2d 729 (D.C. Cir. 1990).. 16

Bennett v. Spear, 520 U.S. 154 (1997). 14, 18-22

Douglas County v. Babbitt,
48 F.3d 1495 (9th Cir. 1995).. 3

Ex parte Young, 209 U.S. 123 (1908). 5-7

Fairbanks N. Star Borough v.
U.S. Army Corps of Eng'rs,
543 F.3d 586 (9th Cir. 2008).. . . . . 8, 17

Free Enterprise Fund v. Public Company
Accounting Oversight Board,
130 S. Ct. 3138 (2010).. . . . . 13, 14

Gen. Elec. Co. v. EPA,
290 F.3d 377 (D.C. Cir. 2002).. 16

McNary v. Haitian Refugee Center, Inc.,
498 U.S. 479 (1991).. 14

MedImmune, Inc. v. Genentech,
549 U.S. 118 (2007).. 13

Morris v. Gressette, 432 U.S. 491 (1977). 11

N. Cal. River Watch v. City of Healdsburg,
496 F.3d 993 (9th Cir. 2007).. 12-13

TABLE OF AUTHORITIES—Continued

Page

N. Cal. River Watch v. Wilcox,
633 F.3d 766 (9th Cir. 2011)..... 12

National Labor Relations Board v. United Food & Commercial Workers Union, Local 23,
484 U.S. 112 (1987)..... 11

Nollan v. Cal. Coastal Comm'n,
483 U.S. 825 (1987)..... 5

Pub. Util. Dist. No. 1 v. Bonneville Power Admin., 506 F.3d 1145 (9th Cir. 2007)..... 21

Rapanos v. United States,
547 U.S. 715 (2006)..... 13

Reisman v. Caplin, 375 U.S. 440 (1964)..... 6

Thunder Basin Coal Co. v. Reich,
510 U.S. 200 (1994)..... 5

United States v. Dell'Aquilla,
150 F.3d 329 (3d Cir. 1998)..... 7

Statutes

5 U.S.C. § 551(6)..... 15

§ 704..... 16

33 U.S.C. § 1251(b)..... 4

§ 1319(a)(3)..... 15-16

§ 1319(b)..... 16

§ 1319(d)..... 6-7, 16

§ 1319(g)..... 11

§ 1319(g)(8)(B)..... 7

TABLE OF AUTHORITIES—Continued

Page

Regulations

33 C.F.R. § 326.3(e)(1).. . . . . 8, 21

§ 326.3(e)(1)(ii). 21

§ 326.3(e)(1)(iv). 21

INTRODUCTION

Contrary to the insinuations of Respondent Environmental Protection Agency (EPA), *see* Brief for the Respondents (Resp. Br.) at 12-13, 52-54, Petitioners Michael and Chantell Sackett did not know and had no reason to know that the small lot on which they had started to build their dream home might be a wetland subject to regulation by a federal agency. *see* Decl. of Chantell Sackett in Support of Pet'rs' Objections ¶ 5; J.A. 7 (Compl. ¶ 6 ("Nothing in the [property's] title documents or title policy indicated any limitation on development.")); J.A. 34 (Sacketts' counsel's letter to EPA asserting that "the Site is not a wetland"). The Sacketts seek judicial review of EPA's compliance order, which threatens crushing daily civil fines and has put their homebuilding on indefinite hold. Although EPA contends that the Sacketts have no right to a meaningful day in court to challenge the jurisdictional findings on which EPA's order is based, EPA's arguments cannot withstand scrutiny.

First and foremost, the compliance order deprives the Sacketts of protected property interests, most prominently by denying them the use of their property and the right to build their family home. Because the Clean Water Act does not provide the Sacketts adequate post-deprivation review, due process can be satisfied only by giving the Sacketts the right to challenge EPA's order under the Administrative Procedure Act (APA). Second, Congress did not intend to deny landowners like the Sacketts an opportunity for meaningful judicial review of EPA compliance orders under the APA. EPA wants landowners like the Sacketts to cower before the immense penalties that a compliance order imposes, but does not want them to

be able effectively to challenge the agency's assertion of power. Congress could not have intended to authorize such a perverse regime. And third, in light of the foregoing, a compliance order is final agency action under the APA. A compliance order is not a friendly invitation to talk about the law. Nor is it a casual informational document. It is, instead, a direct "order," based on case-specific "findings," that imposes severe "sanctions" for conduct inconsistent with its commands. Accordingly, the Sacketts's APA action should proceed.

ARGUMENT

I

DUE PROCESS REQUIRES THAT THE SACKETTS BE AFFORDED PROMPT JUDICIAL REVIEW OF THE COMPLIANCE ORDER

The compliance order has deprived the Sacketts of due process because they have received no prompt judicial post-deprivation hearing. The Sacketts' rights will continue to be violated until they are afforded such review. EPA rhetorically defends itself on the ground that the Sacketts' travails are their own fault. *See* Resp. Br. at 52. EPA argues that a prompt judicial hearing is not required because the compliance order has purportedly not deprived the Sacketts of a protected interest, reasoning that the compliance order merely restates the Sacketts' existing statutory obligations and does not impose any new obligations. *See id.* at 45-46. EPA also contends that the statute's built-in review provisions satisfy the Sacketts' due

process rights. *See id.* at 49-52. EPA's arguments are without merit.[1]

To begin with, the Sacketts' current predicament is decidedly not of their own making. Prior to commencing construction, the Sacketts had obtained all government approvals that they thought necessary. J.A. 10. The Sacketts had no reason to believe that their property contained any wetlands, let alone wetlands under EPA's control. The property is within an existing subdivision bounded by two other lots and two county roads. *See* J.A. 9-10. Within just hundreds of feet of the Sacketts' lot are many developed structures. *Id.* There is no continuous surface water connection between the property and Priest Lake, J.A. 10, or any wetlands, *id.* at 34. By faulting the Sacketts for not having contacted them before beginning construction, EPA seeks to become a national land use agency, requiring that every earthmoving project in the country first get pre-clearance from it or the United

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[1] EPA contends that the Sacketts should not be allowed to raise their post-deprivation claim here because it was not raised below. *See* Resp. Br. at 45. EPA is incorrect. *See* J.A. 13-14 (Compl. ¶ 46 (due process challenge to the compliance order)). The Sacketts have consistently pressed their due process claims, in particular the claim that the failure to afford APA review results in a violation of their due process rights. *See* Pet. for Cert. at 9-10; Apps.' 9th Cir. Opening Br. at 13; Pls.' Opp'n to U.S.'s Mot. to Dismiss Compl. for Lack of Subject Matter Jurisdiction at 1. To be sure, in their opening brief in this Court the Sacketts explain in greater detail than they have previously the precise contours of their due process arguments. But unlike issues, a party is always entitled further to explicate its legal arguments on appeal. *Cf. Douglas County v. Babbitt*, 48 F.3d 1495, 1502 n.8 (9th Cir. 1995) ("[T]here is no bar to . . . raising new arguments . . . if those arguments are purely legal.").

States Army Corps of Engineers.[2] Congress did not countenance such an arrogation of power. *See* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . .").

Further, EPA cannot evade due process by claiming that the Clean Water Act itself, and not the compliance order, caused any deprivation. *Cf.* Resp. Br. at 45-46, 54. The Act may have provided the authority, but EPA chose the enforcement mechanism. It is the issuance of the compliance order that is the final agency action. Had EPA opted to file an action in court, rather than issue a compliance order, there would have been no due process violation.

Neither can EPA evade due process by claiming that the compliance order is like an informal, informational "warning letter." The order is much more than that. It is based on specific factual "findings" that are determinative of the order's conclusions that the Sacketts' property is subject to federal regulation, that a violation of the Clean Water Act has occurred, and that nothing short of complete restoration of the property is required in remediation. *See* J.A. 51-53, 55.

Indeed, unlike a "warning letter," violation of the compliance order itself imposes potential civil liability above and beyond any liability for having violated the Clean Water Act (now set at $37,500 per day). *See* 33

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[2] *Cf.* Brief of the States of Alaska, *et al.*, in Support of Petitioners at 1-4; Brief of Amici Curiae Wet Weather Partnership, *et al.*, in Support of Petitioners at 3-4.

U.S.C. § 1319(d). Simply because the compliance order is not "self-executing," *see* Resp. Br. at 45, is irrelevant to the constitutional question. The compliance order is not advisory. It is mandatory. The order does not merely warn of an enforcement action. It *is* an enforcement action. Were it considered otherwise, then an agency could subvert due process by the simple expedient of ostensibly giving a landowner the freedom to reject a proposed deprivation, but then coercing the landowner to relinquish his protected interest by severely punishing the landowner's supposedly free choice not to comply. This Court has rejected an analogous "out-and-out plan of extortion" before, *see Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987), and it should do so here again.

Assuming that the compliance order deprives the Sacketts of protected interests, EPA nevertheless contends that the Clean Water Act provides "extensive safeguards" for their due process rights—namely, the judicial review obtainable as a defendant in a Section 309(b) civil action, and the statute's permitting process. But, as shown below, neither of these supposed safeguards allows the Sacketts to protect the interests that the *compliance order* impinges.

Review under Section 309(b) is not constitutionally adequate simply because civil penalty liability becomes "final and payable only after full [judicial] review." Resp. Br. at 50 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994)). *See also* Resp. Br. at 51-52. The gist of *Ex parte Young*, 209 U.S. 123 (1908), as confirmed in *Thunder Basin*, is that, *notwithstanding such full review*, a statute still violates due process if review can be obtained only by risking significant liability. *Thunder Basin*, 510 U.S.

at 217-18; *id.* at 221 (Scalia, J., concurring in part and concurring in the judgment). Thus, the fact that the Sacketts' bank accounts cannot be docked until after EPA successfully brings a civil action does not make Section 309(b) review constitutionally adequate.

In contending that Section 309(b) review is constitutionally adequate, EPA attempts to distinguish *Ex parte Young* on two grounds: (1) the challenged rate orders changed the applicable law by imposing confiscatory rates; and (2) the penalties were "automatic." *See* Resp. Br. at 48-49. The decision, however, cannot be distinguished on those grounds. First, the Sacketts' compliance order *does* change existing law by imposing a number of remedial obligations on the Sacketts that are traceable only to the order, not the statute, and by imposing a new and distinct civil liability for failing to abide by the order. *See infra* Part III.B. Second, the penalties in *Ex parte Young* were not automatic, in that they could not have been assessed until *after* the railroad officials had been duly convicted. *See* 209 U.S. at 148 (holding the rate order laws unconstitutional because they "impos[ed] such enormous fines and possible imprisonment as a result of an *unsuccessful* effort to test the validity of the laws themselves") (emphasis added).

Nor can the rule of *Ex parte Young* be distinguished from this case on the theory that the Sacketts could assert a *partial* good-faith defense to civil penalty liability. This Court has held that the *Ex parte Young* infirmity can be avoided only if good faith operates as a *complete* defense to liability. *Cf. Reisman v. Caplin*, 375 U.S. 440, 446-47 (1964), *cited in* Resp. Br. at 48 (holding that punishment for violation of IRS summons did not violate the rule of

Ex parte Young because "noncompliance is *not subject to prosecution thereunder* when the summons is attacked in good faith") (emphasis added). The Clean Water Act, however, imposes a regime of strict liability. *See Am. Canoe Ass'n v. Murphy Farms, Inc.*, 412 F.3d 536, 540 (4th Cir. 2005). And the statute authorizes a district court to take good faith into account as *only one of many factors* to assessing a civil penalty. *See* 33 U.S.C. § 1319(d). Such discretionary power cannot avoid the *Ex parte Young* problem, given that even a 99% reduction in the statutory maximum for compliance order violations on account of their good faith would still leave the Sacketts paying hundreds of thousands of dollars in fines. *See* Petitioners' Brief on the Merits (Pet. Br.) at 29-30. Thus, EPA's assertion that district courts "often award far less than the statutory maximum." Resp. Br. at 50, is no remedy for the Sacketts' constitutional injury, particularly where it is the custom of lower courts presumptively to impose the statutory maximum. *See United States v. Dell'Aquilla*, 150 F.3d 329, 339 (3d Cir. 1998).

Moreover, the compliance order itself states that "violation of, or failure to comply with, the foregoing [o]rder" may result in "administrative penalties . . . pursuant to 309(g) of the Act." J.A. 56. Assuming that EPA has this authority and chooses to assess administrative penalties to enforce the compliance order, and the Sacketts challenge these penalties under Section 309(g)(8), the finding of violation would be set side only if not supported by substantial evidence. *See* 33 U.S.C.§ 1319(g)(8). In other words, a court's review of penalties in this instance would be limited to "abuse of discretion" without any consideration of "good faith" efforts.

Also, the statute's permitting process is no substitute for adequate judicial review, either.[3] *Cf.* Resp. Br. at 50-51. The permitting process can never provide the Sacketts with meaningful review of the *compliance order*. EPA itself acknowledges that the permitting process provides review only of the Corps' permitting decision, *not* EPA's compliance order. *See* Resp. Br. at 51 ("When the Corps denies a permit, or issues a permit subject to conditions that the applicant opposes, the applicant may seek judicial review *of that decision* . . . .") (emphasis added). Further, meaningful review means more than that the Sacketts could test the agency's jurisdiction over their property within the context of a lawsuit challenging a permit denial.[4] The issue of EPA's jurisdiction is important only because it means that the Sacketts cannot build their family home without *first* satisfying EPA's demands[5] and obtaining a decision from the

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[3] EPA's argument that the permitting process is not time-consuming and expensive is based principally on the existence of Nationwide Permits. *See* Resp. Br. at 53 & n.16. Notably, EPA never asserts that the *Sacketts'* homebuilding project could qualify for a Nationwide Permit, and never before in this litigation has EPA asserted that such a permit would be available. EPA's speculative suggestion is simply not credible.

[4] Contrary to EPA's view, a jurisdictional determination from the Corps is of no help to the Sacketts, given that (1) the compliance order has already been issued, and (2) such a determination would not be judicially reviewable. *See Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 597 (9th Cir. 2008).

[5] Once a compliance order has been issued, a permit can be obtained—if at all—only once the permittee completes "any required initial corrective measures." 33 C.F.R. § 326.3(e)(1).

(continued...)

Corps on an application for a permit which they do not believe they are legally mandated to acquire. Thus, allowing the Sacketts to obtain review of EPA's jurisdiction only after having met the compliance order's demands is meaningless.

Accordingly, the Sacketts' due process rights can be satisfied only by prompt judicial review under the APA.

II

THE CLEAN WATER ACT DOES NOT PRECLUDE REVIEW OF THE COMPLIANCE ORDER UNDER THE ADMINISTRATIVE PROCEDURE ACT

Congress did not intend to preclude judicial review of compliance orders under the APA. In arguing to the contrary, EPA never comes to terms with the cumulative impact of the factors that differentiate the Clean Water Act's compliance order regime from other instances where the Court has held judicial review to be precluded. Here, the compliance order: (1) ends the administrative process without providing any means for the recipient to initiate administrative or judicial review, let alone to expedite such review; (2) constitutes one of the agency's *enforcement* measures, *not* a prelude to enforcement; (3) makes findings and adjudicates a violation of the statute; and (4) imposes severe sanctions for violation of its particular terms. EPA's failure to cite any decision of this Court precluding APA review of an agency action

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[5] (...continued)
which presumably in the Sacketts' case would mean substantial compliance with the compliance order's terms.

like the compliance order is not surprising. To credit EPA's view would allow the agency to badger, harass, intimidate, and threaten the Sacketts for years, all the while intending to affect the Sacketts' choice of actions. *cf.* Resp. Br. at 42-43, but leaving the Sacketts powerless to defend themselves. Congress could not have intended such an unfair result. Rather, Congress intended for compliance order recipients to bring their own APA action.

Contrary to EPA's assertions, judicial review of compliance orders under the APA would be consistent with EPA's enforcement discretion, and would not drain the agency's resources. *Cf.* Resp. Br. at 36-38. The possibility for judicial review of compliance orders would not dictate how EPA chooses to enforce the Clean Water Act, although it may discourage overzealous enforcement when the agency is unsure of the facts. This would advance the Act's purpose to defend against real risks while promoting the constitutionally protected rights of the individual. Relatedly, EPA's fears of drained budgets are exaggerated because they are based on the unfounded assumption that all compliance order recipients will seek judicial review of their orders. But most compliance order recipients will not seek judicial review owing to the costs and time that litigation requires. Those cases for which review is sought will likely be the cases where EPA's jurisdiction is most in doubt and the salutary check of judicial review most needed. *See* Pet. Br. at 48.

Further, judicial review of compliance orders would be consistent with the Clean Water Act's enforcement provisions. The compliance order is not just one step in the "deliberative process" which might

lead to enforcement. *Cf.* Resp. Br. at 38. Rather, the compliance order is *itself* an enforcement action, coequal with EPA's other enforcement options, *i.e.*, a civil action and an administrative penalty proceeding. *Cf.* 33 U.S.C. § 1319(b), (g). Indeed, the statutory basis for a compliance order—a finding of statutory violation—is the same for all these enforcement options. Thus, EPA's reliance on *Morris v. Gressette*, 432 U.S. 491 (1977), and *National Labor Relations Board v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112 (1987), is misplaced. Judicial review cannot constrain EPA's enforcement powers because the compliance order is a consummated enforcement act. Hence, judicial review under the APA would serve as a post-deprivation hearing, not a pre-deprivation hearing.

EPA also contends that judicial review of compliance orders would not necessarily resolve all compliance issues, and "might" force EPA to bring an enforcement action as a compulsory counterclaim. *See* Resp. Br. at 37-38. But to use such speculative outcomes as the basis for imputing to Congress the intent to preclude judicial review under the APA would effectively eviscerate the strong presumption in favor of such review, a presumption that even EPA acknowledges. *See id.* at 34. And in any event, EPA fails to recognize that judicial review of the compliance order *would* definitively resolve the *jurisdictional* issues, which is the resolution that the Sacketts seek. Such a result would also benefit EPA, which would be able to direct its enforcement budgets to those activities over which it has jurisdiction. *See* Pet. Br. at 48.

Judicial review of compliance orders would not create a disincentive for EPA's use of "informational" warning letters. *Cf.* Resp. Br. at 39-40. To the contrary, it would likely expand the agency's use of such letters. EPA admits that a compliance order is different from a warning letter in that the former creates its own liability. *Cf. id.* at 30. Unlike warning letters, compliance orders require affirmative actions and impose potential liability for failure to comply. Therefore, authorizing judicial review of compliance orders would not elevate warning letters to final agency action as EPA argues.

That Congress did not intend to preclude judicial review of compliance orders is confirmed by the fact that the Sacketts cannot obtain *meaningful* judicial review of the compliance order as defendants in a civil action brought by EPA. Even if the Sacketts could raise a jurisdictional defense to any alleged violations of the compliance order or the statute itself in such a proceeding, *cf. id.* at 41-42, that fact does not make such review meaningful, if the cost of getting to that point requires the Sacketts to risk significant civil liability. The Sacketts' fear of such liability is not "because they are less than fully confident that a court would agree with their position on the issue of CWA coverage." *Id.* at 42. No party can predict with absolute certainty whether he will ultimately prevail in litigation.[6] For that reason, this Court has

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[6] That is especially so given that this Court has not agreed to a single rule for determining which wetlands are jurisdictional. *See Rapanos v. United States*, 547 U.S. 715, 742 (2006) (plurality op.); *id.* at 759, 780 (Kennedy, J., concurring in the judgment); *id.* at 787, 788 (Stevens, J., dissenting). The Ninth Circuit itself is conflicted as to the controlling rule. *Compare N. Cal. River Watch*

(continued...)

recognized that it would be expecting too much of human nature to demand that a party "bet the farm" just to get a chance at judicial review. *See MedImmune, Inc. v. Genentech*, 549 U.S. 118, 129 (2007).

EPA's attempts to distinguish the Sacketts' supporting authority fail. It is true that, unlike this case, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010), the petitioners objected to the agency's constitutionality, not to any action taken by the agency under the statute, and they had not already incurred a sanction. *Cf.* Resp. Br. at 43. But these differences are irrelevant to the particular holding on which the Sacketts rely—namely, a given avenue of judicial review is categorically not meaningful if review can be obtained only by risking a "sizable fine." *Free Enter. Fund*, 130 S. Ct. at 3150-51. That rule applies regardless of the nature of the claims that a party seeks to raise. And although the *Free Enterprise Fund* petitioners had not yet incurred any liability, the point is irrelevant to determining, *prospectively*, whether a party must chance *additional* liability to obtain judicial review. The Sacketts are therefore in the same position as the *Free Enterprise Fund* petitioners, in that they must violate the compliance order and invite a civil action (thus triggering substantial civil liability) to have any hope of Section 309(b) judicial review.

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[5] (...continued)
v. City of Healdsburg, 496 F.3d 993, 999-1000 (9th Cir. 2007) ("Justice Kennedy's concurrence provides the controlling rule of law for our case."), *with N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 781 (9th Cir. 2011) (observing that *Healdsburg* does not foreclose use of the *Rapanos* plurality test).

EPA's attempt to distinguish *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), fails for the same reason. EPA is correct that the *McNary* petitioners' constitutional claims were collateral to determining the immigration status of any given alien, and that it would have been difficult to litigate such constitutional claims on the truncated administrative record used in a deportation proceeding. *See* Resp. Br. at 44. But just as in *Free Enterprise Fund*, so in *McNary*: these differences were irrelevant to the Court's specific determination that deportation proceedings were categorically not meaningful avenues of relief, because to obtain such review aliens would have been required to "voluntarily surrender themselves for deportation," a course of action which, "[q]uite obviously, . . . is tantamount to a complete denial of judicial review." *McNary*, 498 U.S. at 496-97.

Without a judicial hearing, the Sacketts are deprived of meaningful review of the compliance order. The Clean Water Act does not preclude such review.

III

THE COMPLIANCE ORDER IS FINAL AGENCY ACTION

Under *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997), the Sacketts' compliance order is final agency action: it marks the consummation of EPA's decisionmaking process, and creates new legal obligations and liabilities. The intent of Congress, the Clean Water Act's text, the procedural history of this case, and the precedents of this Court confirm that conclusion.

A. The Compliance Order Is the Culmination of EPA's Decisionmaking

The compliance order marks the consummation of EPA's decisionmaking process with respect to whether EPA has jurisdiction and whether the Sacketts' conduct has violated the Clean Water Act. The Act makes clear that Congress intended such orders to be final. To issue a compliance order EPA first "finds" that the statute has been violated. *See* 33 U.S.C. § 1319(a)(3). Once that finding has been made, the statute directs that the agency "shall issue an order requiring [compliance]." *Id.* The act of making a finding and issuing an order traditionally denotes finality.[7]

The compliance order's text also supports the order's finality. The document describes itself as an "ORDER." J.A. 50. It sets forth "FINDINGS AND CONCLUSIONS" that substantiate an alleged violation of law. *See id.* at 50-53. It "ORDER[S]" a number of onerous remedial measures. *Id.* at 53-55. And, it imposes "SANCTIONS" for violation of its terms. *Id.* at 56. None of these aspects of the order is consistent with EPA's characterization of the order as tentative, informal, or merely informative.

Indeed, such a characterization is inconsistent with EPA's own interpretation of the order. Although EPA contends that the order does not become final until EPA brings a civil action, Resp. Br. at 27, EPA nevertheless maintains that the Sacketts can be held liable for violating both the Clean Water Act *and* the compliance order itself, *id.* at 30, 49. But liability

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[7] *See* 5 U.S.C. § 551(6) (defining "order" in part as "the whole or a part of a *final* disposition") (emphasis added).

flowing from the compliance order would begin to accrue *before* EPA brought a civil action. Thus, EPA impermissibly wants its "find[ing]" of violation supporting the compliance order, *cf.* 33 U.S.C. § 1319(a)(3), to be considered nonfinal, but wants that same finding supporting a civil action, *cf. id.* § 1319(b), to be considered final.

That the order ends, rather than begins, EPA's decisionmaking, further supports the order's finality. Unlike the agency actions at issue in EPA's cited authority, *see* Resp. Br. at 25-27, the compliance order is not a prelude to enforcement. Rather, the compliance order *is* enforcement. The statute itself makes clear that the issuance of the compliance order is one of two equal *enforcement* options that EPA may take once it "finds" that the statute has been violated. *See* 33 U.S.C. § 1319(a)(3) (authorizing EPA to "issue an order requiring such person to comply with such section or requirement, *or* [to] bring a civil action") (emphasis added). *Cf.* 33 U.S.C. § 1319(d) (treating violations of the statute and a compliance order as equivalents for purposes of civil penalties).

The fact that the compliance order "encourage[s the Sacketts] to discuss any allegations herein which [the Sacketts] believe to be inaccurate" does not undercut the order's finality. *Cf.* Resp. Br. at 25-26 (quoting Pet. Cert. App. G-6). The quoted language merely articulates the fundamental proposition that an agency can always reconsider otherwise final actions that it takes. *See Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002); *Am. Petroleum Inst. v. U.S. EPA*, 906 F.2d 729, 739-40 (D.C. Cir. 1990). *See generally* 5 U.S.C. § 704 ("[A]gency action otherwise final is final for the purposes of this section whether or not there

has been presented or determined an application for . . . any form of reconsideration . . . ."). Simply because an agency reserves to itself the power to change its mind if new or different facts or circumstances emerge does not render an otherwise final action nonfinal. *See Fairbanks*, 543 F.3d at 592 n.4 (holding that the Corps' jurisdictional determination did not become any less final simply because "physical condition[s]" on the site might change); *Alaska v. U.S. EPA*, 244 F.3d 748, 750 (9th Cir. 2001) (holding that Clean Air Act compliance orders were final agency action where the orders presented the agency's "final position on the factual circumstances *upon which the Orders are predicated*," even though the agency's position might change if the relevant factual "circumstances" were to change) (emphasis added). What matters is that an agency has definitively applied the law to a given set of alleged facts, which is precisely what EPA has done here.

The Sacketts' own experience confirms that the compliance order's "encourage[ment]" for "consultation" (as EPA describes it) is illusory. Following issuance of the compliance order, the Sacketts' counsel sent a letter to EPA requesting an administrative hearing to dispute the facts on which the compliance order is based. J.A. 32-36. EPA's answer provided that the agency intended in the near future to give "a more detail[ed] response stating EPA's position" regarding "the various authorities available to EPA to force compliance with the Compliance Order and/or seek penalties for the underlying Clean Water Act violations." Appellants' ER at 25. Yet EPA never provided that detailed response to the Sacketts' letter. Thus, the Sacketts' experience confirms that EPA had no intention to revisit its legal determinations, and

instead planned merely to provide the Sacketts with a brief on how EPA could compel compliance with the order and seek penalties. *Cf.* Br. Amicus Curiae of U.S. Chamber of Commerce in Support of Petitioners at 7 (quoting internal EPA documents indicating that EPA trains "its personnel to make the terms of unilateral orders 'ugly, onerous, and tough' and 'very unpleasant,' in order to coerce settlements," and "to threaten recipients with games of 'Russian Roulette'").

Accordingly, because the compliance order marks the consummation of EPA's decisionmaking process, the order satisfies *Bennett*'s first prong.

B. The Compliance Order Creates Numerous Legal Effects

The compliance order satisfies *Bennett*'s second prong because it imposes new legal obligations, as well as new legal liabilities. To begin with, the compliance order does more than merely restate the Clean Water Act's general obligations. Indeed, the order *applies* those general obligations directly to the Sacketts by finding that the lot contains regulable wetlands, J.A. 51-52, and that the Sacketts have acted illegally by filling those wetlands without a permit, *id.* at 52-53. The compliance order also goes further than the statute by requiring that the site be "restored," *id.* at 53, to its "pre-disturbance, vegetative condition," *id.* at 55, and that buyers be provided notice of the compliance order, *id.* at 55. Neither obligation is found explicitly in the Clean Water Act.

EPA itself admits that the compliance order has legal effect in two ways: (1) by subjecting the Sacketts to additional civil penalty liability; and (2), by making

it more difficult for them to obtain an after-the-fact permit.

1. The Compliance Order Imposes Additional Liability

With respect to civil penalties, EPA concedes that, if "a court finds that particular conduct violated both the [Clean Water Act] and a valid compliance order," the court "can impose separate penalties for the two violations," such that the ensuing "civil penalty [would] exceed[] the statutory maximum for the statutory violation." Resp. Br. at 30. EPA's concession establishes that the compliance order has independent legal effect.

That conclusion follows whether or not it is a "remote possibility" (owing to EPA's prosecutorial discretion and a district court's equitable powers) that the Sacketts would ultimately have to pay a civil penalty greater than what they would have had to pay if the compliance order had never been issued. *See* Resp. Br. at 30. The *Bennett* test concerns finality, not likelihood of enforcement. For an agency action to be final, it does not matter whether the affected parties are ultimately better or worse off. *See Alaska*, 244 F.3d at 750 (holding a Clean Air Act compliance order final agency action because its recipient *could* be held liable for violations of the order as well as the statute), *aff'd*, *ADEC*, 540 U.S. 461, 483 (2004) (holding that the order produced legal consequences because a party "would *risk* civil and criminal penalties if it defied a valid EPA directive") (emphasis added). In any event, the likelihood of an elevated penalty is greater than EPA depicts. For example, a court could impose a small fine for the original statutory violation because of a landowner's ignorance. But the court could well

decide to impose a steep fine for violation of a subsequently issued compliance order, on the theory that the order put the landowner on notice.

In light of these legal liabilities, analogizing the compliance order to agency warning letters, notices of violation, or similar documents, *see* Resp. Br. at 19-21, is untenable. Unlike a compliance order, these other agency actions do not impose liability for violation of their own terms. *Cf. id.* The compliance order goes beyond mere notification or explanation of legal rights or responsibilities: it actually imposes concrete obligations the violation of which trigger a liability that is separate and distinct from any liability for having violated the authorizing statute itself. The Sacketts' compliance order is not a friendly invitation to chat about the Clean Water Act's requirements with EPA officials. Indeed, the order threatens them with substantial civil penalties if they do not comply. *See* J.A. 56. No reasonable person would interpret the compliance order as anything other than a mandatory directive, backed by the full weight of the United States government, to comply with its terms or risk severe civil or criminal sanctions.

Hence, because the compliance order indisputably imposes an additional liability for civil penalties, the order satisfies *Bennett*'s second prong.

2. The Compliance Order Imposes Additional Legal Obligations

In addition to its imposition of civil penalty liability, the compliance order satisfies the second prong of the *Bennett* test because it makes it materially harder for the Sacketts to obtain an after-the-fact

permit.[8] EPA concedes that, once a compliance order has been issued, the Corps will accept for processing an after-the-fact permit application only if the Corps determines that processing the application would be "clearly appropriate." *See* Resp. Br. at 31 (citing 33 C.F.R. § 326.3(e)(1)(iv)). In contrast, if no compliance order has been issued, the Corps will accept an after-the-fact permit application upon completion of any "required initial corrective measures." *See* Resp. Br. at 32 (citing 33 C.F.R. § 326.3(e)(1)). The added burden of meeting the "clearly appropriate" standard satisfies *Bennett*'s second prong. *See Pub. Util. Dist. No. 1 v. Bonneville Power Admin.*, 506 F.3d 1145, 1152 (9th Cir. 2007) (agency action that creates "new benefits and obligations" is final).

This Court's decision in *ADEC* supports the conclusion that the Sacketts' compliance order is final agency action, notwithstanding EPA's attempts to distinguish *ADEC*. *Cf.* Resp. Br. at 32-34.

First, that the *ADEC* order was preceded by "interactions" between the agency and the regulated party is irrelevant to whether the order itself is final, *i.e.*, whether the order represents the *agency's* final say. Second, just as in *ADEC*, the compliance order issued to the Sacketts makes clear that, *assuming the facts to be as EPA believes them*, it is EPA's position that the Sacketts' conduct violated the Clean Water Act. Although the compliance order "encourages"

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[8] It is the Sacketts' position that they are categorically ineligible for an after-the-fact permit under the Corps' regulations. *See* 33 C.F.R. § 326.3(e)(1)(ii). For the sake of establishing the compliance order's finality, however, the Sacketts assume that EPA is correct and that an after-the-fact permit may be available. *See id.* § 326.3(e)(1).

future communication with respect to the order's allegations that may be "inaccurate" or remedial actions that are unattainable. *see* J.A. 54-55. it does not invite discussion of EPA's position regarding the allegations' legal significance. Thus. the fact that the compliance order leaves open the possibility of amendment based on new information or changed circumstances is no different from the *ADEC* order. *See Alaska*. 244 F.3d at 750: *ADEC*. 540 U.S. at 483 (observing that "EPA had asserted its final position on the factual circumstances underpinning the Agency's orders") (internal quotation marks omitted). Third. as already noted. the compliance order *does* impose specific new legal obligations on the Sacketts. Yet. even if the order imposed no obligation beyond the statute. *ADEC* would still be apposite. The Court there expressly noted that *Bennett*'s second prong can be satisfied if the agency action determines "rights or obligations" ***or*** produces "legal consequences." *See* 540 U.S. at 483. The Court concluded that the order at issue met that test because the order imposed "practical and legal consequences (lost costs and vulnerability to penalties)." *Id*. The compliance order here produces substantially the same practical and legal consequences for the Sacketts: it stops their homebuilding project and denies them all lawful use of their property. it requires them to undo their work at a price tag of $27.000. it commands them to "restore" their property to wetlands. and it imposes enormous daily civil fines for violation of its terms. *See* Pet. Br. at 17-18. *ADEC* is therefore in point.

Because the compliance order imposes obligations and liabilities on the Sacketts beyond what would exist in the absence of the order. it satisfies *Bennett*'s second

prong. And because the compliance order also marks the consummation of EPA's decisionmaking, the order constitutes final agency action.

CONCLUSION

The judgment of the court of appeals should be reversed.

DATED: December, 2011.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-1062

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In The
Supreme Court of the United States

CHANTELL SACKETT, et vir,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF ALASKA, WYOMING, HAWAII, SOUTH CAROLINA, VIRGINIA, NORTH DAKOTA, NEBRASKA, ARIZONA, COLORADO, AND MICHIGAN AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. PRE-ENFORCEMENT JUDICIAL REVIEW OF CLEAN WATER ACT COMPLIANCE ORDERS IS AUTHORIZED UNDER SECTION 704 OF THE ADMINISTRATIVE PROCEDURE ACT 5

A. EPA's Compliance Order Constitutes Final Agency Action Under Section 704 of the Administrative Procedure 6

B. The Clean Water Act Does Not Preclude Pre-enforcement Judicial Review of Compliance Orders Under the Administrative Procedure Act 13

II. DUE PROCESS REQUIRES THAT RECIPIENTS OF AN EPA COMPLIANCE ORDER BE ALLOWED A PRE-ENFORCEMENT HEARING TO CHALLENGE THE EXERCISE OF FEDERAL JURISDICTION AND ENFORCEMENT AUTHORITY 21

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 6, 13, 14, 19, 20

Alaska Department of Environmental Conservation v. Environmental Protection Agency, 540 U.S. 461 (2004) 11, 12, 13, 26

Alaska Department of Environmental Conservation v. EPA, 244 F.3d 748 (9th Cir. 2001) 12

Allsteel Inc. v. United States EPA, 25 F.3d 312 (6th Cir. 1994) 12, 24, 25

Armco v. United States EPA, 124 F.2d 474 (N.D. Ohio 2000) 24

Bennett v. Spear, 520 U.S. 154 (1997) 7, 9, 11, 12, 13

Block v. Community Nutrition Institute, 467 U.S. 340 (1984) 6

Califano v. Sanders, 430 U.S. 99 (1977) 6

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568 (1988) 14

Fairbanks Northstar Borough v. U.S. Army Corps of Engineers, 543 F.3d 586 (9th Cir. 2008) 8, 9

Fuentes v. Shevin, 407 U.S. 67 (1972) 24

Harrison v. PPG Industries, 446 U.S. 578 (1980) 25

Hoffman Group, Inc. v. EPA, 902 F.2d 567 (7th Cir. 1990) 15, 16, 17

TABLE OF AUTHORITIES – Continued

Page

Laguna Gatuna, Inc. v. Browner, 58 F.3d 564 (10th Cir. 1995) 15

Leslie Salt Co. v. United States, 660 F. Supp. 183 (N.D. Cal. 1987) 16

Lloyd A. Fry Roofing Co. v. United States EPA, 554 F.2d 885 (8th Cir. 1977) 17

Mathews v. Eldridge, 424 U.S. 319 (1976) 25

P.F.Z. Properties, Inc. v. Train, 393 F. Supp. 1370 (D. D.C. 1975) 16, 18

Rapanos v. United States, 547 U.S. 715 (2006) ... 2, 3, 5, 10

Rueth v. United States Environmental Protection Agency, 13 F.3d 227 (7th Cir. 1993) 23

Sackett v. EPA, 622 F.3d 1139 (9th Cir. 2010) 6, 14, 22

Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers, 531 U.S. 159 (2001) 1, 5, 14

Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation, and Enforcement, 20 F.3d 1418 (6th Cir. 1994) 15

Southern Pines Association v. U.S., 912 F.2d 713 (4th Cir. 1990) 15, 16, 17

Swanson v. United States, 600 F. Supp. 802 (D. Idaho 1985), *aff'd*, 789 F.2d 1368 (9th Cir. 1986) 16

Tennessee Valley Authority v. Whitman, 336 F.3d 1236 (11th Cir. 2003) 19, 24

TABLE OF AUTHORITIES – Continued

Page

Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) 20, 21, 22, 25

Ex parte Young, 209 U.S. 123 (1908) 22

CONSTITUTION

U.S. Const. amend. V 22

STATUTES

5 U.S.C. § 701(a) 6

5 U.S.C. § 704 ..... 4, 5, 6

28 U.S.C. § 2461 10

33 U.S.C. § 1251 ..... 1, 23

33 U.S.C. § 1319 ..... 10, 14

33 U.S.C. § 1344 7

42 U.S.C. § 7607 ..... 11, 17

Alaska Statehood Act, § 6, Pub. L. No. 85-508, 72 Stat. 339 (1958) 3

Alaska Stat. § 46.03.100 2

Wyo. Stat. Ann. § 35.11.302(a) 2

Wyo. Stat. Ann. § 35.11.309 2

Va. Code Ann. § 62.1-44.15 2

Va. Code Ann. § 62.1-44.15:20 2

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

33 C.F.R. § 326.3(e)(1)(ii) 25

Alaska Admin. Code tit. 18, Ch. 70 (2011) 2

Alaska Admin. Code tit. 18, Ch. 72 (2011) 2

Alaska Admin. Code tit. 18, Ch. 83 (2011) 2

Ch. 1 of the Wyoming Water Quality Rules and Regulations 2

Ch. 2 of the Wyoming Water Quality Rules and Regulations 2

OTHER AUTHORITIES

P.L. 92-500, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, S. REP. NO. 92-414, 1972 U.S.C.C.A.N. 3668, 3730, 1971 WL 11307 19

74 Fed. Reg. 626, 627 10

OTHER MATERIALS

86 A.L.R. Fed. 604 17

Christopher M. Wynn, *Note, Facing a Hobson's Choice? The Constitutionality of the EPA's Administrative Compliance Order Enforcement Scheme Under the Clean Air Act,* 62 Wash. & Lee L. Rev. 1879, 1920 9

TABLE OF AUTHORITIES – Continued

Page

U.S. Fish and Wildlife Service, Status of Alaska Wetlands (1994), available at http://www.fws.gov/wetlands/_documents/gSandT/StateRegionalReports/StatusAlaskaWetlands.pdf 3

Status of Virginia's Water Resources 3

INTEREST OF AMICI CURIAE[1]

Amici curiae, the states of Alaska, Wyoming, Hawaii, South Carolina, Virginia, North Dakota, Nebraska, Arizona, Colorado, and Michigan have strong interests in the Court's resolution of whether administrative compliance orders issued by either the United States Environmental Protection Agency (EPA) or the United States Army Corps of Engineers (Corps) under the Clean Water Act, 33 U.S.C. § 1251, *et seq.* (CWA), are subject to pre-enforcement judicial review. Amici States' interests are twofold.

First, amici have an interest in maintaining and protecting the States' primary power and responsibility over land and water use and development, which is usurped by the federal agencies' use of compliance orders. In enacting the CWA, Congress recognized the "primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution," and "to plan the development and use (including restoration, preservation, and enhancement) of land and water resources" within their respective boundaries. 33 U.S.C. § 1251(b); *see also Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 174 (2001) (acknowledging States' "traditional and primary power over land and water use"

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[1] The State of Alaska provided written notice to the parties of the intent to file this amici brief on September 7, 2011. This brief was not written in whole or in part by parties' counsel, and no one other than amici made a monetary contribution to its preparation. *See* Sup. Ct. R. 37.6.

under the CWA); *Rapanos v. United States (Rapanos)*, 547 U.S. 715, 738 (2006) (recognizing that regulation of land use "is a quintessential state and local power"). This Court has noted the "immense expansion of federal regulation of land use that has occurred under the Clean Water Act – without any change in the governing statute – during the past five Presidential administrations." *Rapanos*, 547 U.S. at 722. The EPA's expansive assertion of jurisdiction and its use of purportedly unreviewable orders to force compliance undermines state and local authority. The States provide adequate and reasonable safeguards to protect the environment from development activities with an array of laws and regulations. *See, e.g.*, Alaska Stat. § 46.03.100 (2010) (integrated waste discharge permitting authority); Alaska Admin. Code tit. 18, Ch. 70 (2011) (Alaska water quality standards); Alaska Admin. Code tit. 18, Ch. 72 (2011) (wastewater disposal); Alaska Admin. Code tit. 18, Ch. 83 (2011) (Alaska Pollutant Discharge Elimination System Program); Wyo. Stat. Ann. § 35.11.302(a)(v) (2010) (Wyoming Pollution Discharge Elimination System program authority); Wyo. Stat. Ann. § 35.11.309 (2010) (Wyoming's wetlands policy); Ch. 1 of the Wyoming Water Quality Rules and Regulations (Wyoming's Surface Water Standards); Ch. 2 of the Wyoming Water Quality Rules and Regulations (Wyoming Pollution Discharge Elimination System regulations); Va. Code Ann. § 62.1-44.15 (authorizing establishment of water quality standards and administration of Virginia's Pollutant Discharge Elimination System Permit program); Va. Code Ann. § 62.1-44.15:20

(water protection permitting for excavating or filling wetlands).

Second, as landowners, amici States have an interest in judicial review of CWA compliance orders because of the untenable situation the orders create.[2] Without judicial review to determine the validity of a compliance order, the recipient of the order faces a "Hobson's choice": either to comply with an order at the cost of significant development expenses and meaningful judicial review of the wetlands determination, or to decline to comply and risk significant

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[2] For example, amicus State of Alaska is the owner of over 100 million acres of land, granted by Congress at statehood to help the State finance its new government. *See* Alaska Statehood Act, § 6, Pub. L. No. 85-508, 72 Stat. 339 (1958). The State of Alaska also regulates the largest geographic area of any state in the nation, with countless remote tributaries and ponds, and over 174 million acres of wetlands, more wetlands than in all other states combined. U.S. Fish and Wildlife Service, Status of Alaska Wetlands 19 (1994), available at http://www.fws.gov/wetlands/_documents/gSandT/StateRegionalReports/StatusAlaskaWetlands.pdf. Many of these wetlands are remotely located and far removed from any navigable waterbody. The prevalence of isolated waters and wetlands in the state means that more often than not public infrastructure development – such as water and sewer, roads, or airport projects – as well as private development projects – such as home building – in Alaska involve work in wetlands or non-navigable waters. As this Court has recognized, more than half of the surface area of Alaska could potentially qualify as "waters of the U.S." subject to federal regulation under the CWA. *Rapanos*, 547 U.S. at 722; *see also* U.S. Fish and Wildlife Service, Status of Wetlands 18, *supra*. Virginia has 808,000 acres of freshwater wetlands and almost 237,000 acres of tidal and coastal wetlands. Status of Virginia's Water Resources, App. 1.

civil, and possibly criminal, penalties. The States have a sovereign interest to protect their property interests. They also have a strong interest in protecting responsibly-conducted development for housing, infrastructure, and other purposes from overreaching federal regulation that is administered so zealously that it exceeds the objectives of the CWA.

SUMMARY OF ARGUMENT

Pre-enforcement judicial review of CWA administrative compliance orders, including review of the agency's jurisdictional determination underpinning the orders, is authorized by section 704 of the Administrative Procedure Act (APA), 5 U.S.C. § 704, and required by the Due Process Clause. The APA provides for judicial review of final agency action when no other court remedy is available. In this case, the Ninth Circuit declined to follow the long-established presumption favoring judicial review of agency action, based on its view that the CWA statutory scheme implicitly signals congressional intent to preclude judicial review of compliance orders. But the court's conclusion was based on incorrect analysis of the CWA and inapposite comparison of the CWA to other environmental statutes. Nothing in the CWA suggests that Congress intended to preclude judicial review of CWA compliance orders; nothing runs counter to APA section 704; and nothing rebuts the presumption of reviewability.

Even if this Court agrees that the CWA implicitly precludes pre-enforcement judicial review under the

APA, the lack of pre-enforcement judicial review violates due process. Defying a compliance order, even one ultimately found to be unsupportable, exposes the recipient to civil and criminal penalties. Federal law places limits on orders that constitute "final agency action" to protect the regulatory interests of the states and the due process rights of landowners and developers. Pre-enforcement judicial review under the APA ensures that the federal government does not irreversibly exceed those limits in overzealously administering the CWA. But when judicial review must wait until the government decides to bring an action, recipients of compliance orders suffer such coercive consequences as to be effectively denied meaningful process at all.

ARGUMENT

I. PRE-ENFORCEMENT JUDICIAL REVIEW OF CLEAN WATER ACT COMPLIANCE ORDERS IS AUTHORIZED UNDER SECTION 704 OF THE ADMINISTRATIVE PROCEDURE ACT.

Federal authority to regulate waters and wetlands under the CWA is not without limits. *Rapanos*, 547 U.S. at 757, *SWANCC*, 531 U.S. at 159. But because the government takes an expansive view of its jurisdiction under the act, *Rapanos* at 725, 731-32, 739, courts inevitably will be asked to provide the necessary check on this exercise of authority.

Judicial review of CWA compliance orders is authorized by APA section 704, which provides the

right to judicial review of "final agency action for which there is no other remedy in a court." This appeal right applies unless either a statute precludes judicial review or the agency action is committed by law to agency discretion. 5 U.S.C. § 701(a). The Court has recognized a well-established presumption favoring judicial review of agency action, which is overcome only if there is "clear and convincing evidence" of a contrary legislative intent. *Abbott Laboratories v. Gardner (Abbott)*, 387 U.S. 136, 141 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Contrary intent may be found if "congressional intent to preclude judicial review is fairly discernible in the statutory scheme." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984). Because a compliance order constitutes the final agency action as to the underlying wetlands determination and neither of the APA section 701(a) exceptions to judicial review applies, judicial review should be allowed.

A. EPA's Compliance Order Constitutes Final Agency Action Under Section 704 of the Administrative Procedure Act.

The Ninth Circuit did not discuss whether the EPA's order to the Sacketts was "final agency action," but instead focused solely on whether the CWA precludes pre-enforcement judicial review. *Sackett v. EPA*, 622 F.3d 1139 (9th Cir. 2010). While the court's silence on finality might be interpreted to mean that it accepted the order as "final agency action," the opinion is not clear. Whether agency action is final is a threshold requirement to trigger a court's jurisdiction over an APA claim. Consideration of whether a

compliance order constitutes final agency action also informs the due process analysis, if the Court finds that the CWA precludes pre-enforcement judicial review.

The Court has established a two-part test for determining whether agency action is final. "First, the action must mark the 'consummation' of the agency's decisionmaking process . . . – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted). "Purely advisory" action is not final agency action; an agency action that affects the legal rights of others and imposes direct and appreciable legal consequences is. *Id.* at 178.

Here, the compliance order conclusively determined that the Sacketts' property contained wetlands that were "waters of the U.S." subject to federal regulation under section 404 of the CWA. 33 U.S.C. § 1344. EPA directed the Sacketts to stop earthwork on their roughly half-acre residential lot,[3] spend considerable funds to restore the land, reestablish native flora, implement a three-year monitoring program, and then embark upon the CWA's expensive and time-consuming section 404 permitting process (with no guarantee of ultimately getting a permit).

[3] The lot was one of several located in a residential area where some development had already occurred.

Although they disagreed with the wetlands determination, the Sacketts' only alternatives were either to comply or to face significant penalties for failing to comply. EPA denied the Sacketts' request for administrative review of the compliance order – including the underlying jurisdictional determination – and the Sacketts sought judicial review.

EPA's affirmative jurisdictional determination is the necessary, core finding that serves as the basis for issuing the compliance order. The order also marks the end of the agency's decisionmaking process on that underlying determination. Indeed, the Ninth Circuit in another case recognized that such a jurisdictional finding by the Corps is the "ultimate administrative position regarding the presence of wetlands," and the finding is "devoid of any suggestion that it might be subject to subsequent revision or 'further agency consideration or possible modification.'" *Fairbanks Northstar Borough v. U.S. Army Corps of Engineers (Fairbanks)*, 543 F.3d 586, 592 (9th Cir. 2008). The Ninth Circuit in *Fairbanks* rejected the Corps' assertion that changed circumstances to the property in the future might alter the agency's jurisdictional finding, stating that under that view, no agency action would ever be deemed final. *Id.* at 592 n.4. As in *Fairbanks*, the compliance order issued to the Sacketts, underpinned by EPA's necessary

jurisdictional finding, satisfies the first prong of the *Bennett* test.[4]

The second prong of the *Bennett* test is also met. The order is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" 520 U.S. at 177-78. A compliance order issued to property owners like the Sacketts leaves the recipient with clear legal obligations and little choice.[5] To restore property to its original condition in response to a compliance order in many instances will require the owner to incur costs that exceed the value of the property itself, and to sacrifice earlier investment in developing it. Embarking on the CWA section 404 permitting process routinely requires an owner to enter into legally-binding construction design contracts and contracts with third parties for mitigation projects to offset the loss of wetlands associated with construction. This Court has recognized, on data that was compiled nearly a decade ago, that completing

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[4] The Ninth Circuit in *Fairbanks*, which did not involve a compliance order, went on to hold that the Corps' affirmative jurisdictional determination in that case did not satisfy part two of the *Bennett* test, and therefore there was no "final agency action." 543 F.3d at 586. Because of this conclusion, the court specifically stated it did not reach the question of whether the CWA precluded pre-enforcement judicial review. *Id.*

[5] *See also* Christopher M. Wynn, Note, *Facing a Hobson's Choice? The Constitutionality of the EPA's Administrative Compliance Order Enforcement Scheme Under the Clean Air Act*, 62 Wash. & Lee L. Rev. 1879, 1920 (2005).

the section 404 permitting process can be expensive and time-consuming:

> The burden of federal regulation on those who would deposit fill material in locations denominated "waters of the United States" is not trivial. . . . The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915 – *not counting* costs of mitigation or design changes. . . . "[O]ver $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits."

Rapanos, 547 U.S. at 721 (emphasis added; footnote and citations omitted). With inflation, costs associated with the permitting process undoubtedly have increased.

Recipients of compliance orders also face significant penalties should they fail to comply with the order, including civil penalties of up to $37,500 per day, administrative penalties of up to $11,000 per day, and criminal penalties, including jail time. 33 U.S.C. § 1319(c) and (d); 28 U.S.C. § 2461; 74 Fed. Reg. 626, 627 (Jan. 7, 2009). The threat of these oppressive penalties obviously coerces recipients into compliance, into undoing existing development efforts, and restoring the land. They have no alternative opportunity to challenge the legitimacy of an order and its underlying determination of affirmative federal jurisdiction.

This Court's precedent supports the position that EPA's order to the Sacketts is final agency action. In *Alaska Department of Environmental Conservation (ADEC) v. EPA*, 540 U.S. 461 (2004), the Court affirmed the Ninth Circuit's decision that EPA's Clean Air Act compliance orders were "final agency action" subject to judicial review under the *Bennett* test. *Id.* at 481-83 (2004). That case involved a challenge to EPA's issuance of multiple administrative compliance orders under its Clean Air Act oversight authority of the State of Alaska's air permitting program. One order directed the State not to issue a proposed air quality control permit (which the state did later issue), while another order directed the permittee, Cominco, to stop construction of a facility that the state-issued permit had authorized. In its orders, EPA stated that the permit improperly allowed construction of a facility that, in EPA's view, would not comply with the Clean Air Act's best available control technology (BACT) requirements. *Id.* at 479-81.

EPA initially argued that the Ninth Circuit did not have jurisdiction to review the orders because they were "interlocutory" until EPA commenced an enforcement action in district court. *Id.* at 482. EPA later abandoned this position and conceded its order imposed "new legal obligations on Cominco," and the Ninth Circuit found jurisdiction under 42 U.S.C. § 7607(b)(1), which allows challenges involving "any . . . final [EPA] action." *See id.* at 481-82. The court held that EPA had given its final judgment on whether the State had adequately supported its issuance of the

permit, and that this EPA finding was the basis for issuance of the compliance orders. The court also noted that EPA's orders effectively halted construction of the facility, that Cominco would have risked civil and criminal penalties if it continued construction in defiance of the order, and that halting construction of the facility would cost Cominco considerable time and money. *Id.* at 482-83. Thus, the Ninth Circuit had "little trouble concluding . . . that both *Bennett* conditions are met here. . . . [T]he findings in the Orders are [EPA's] 'last word' on its position as to [BACT] and Cominco is in legal jeopardy if it fails to comply with the Orders." *Alaska Department of Environmental Conservation v. EPA*, 244 F.3d 748, 750 (9th Cir. 2001).[6]

The Court affirmed the Ninth Circuit's finding that the compliance order was final agency action:

> We are satisfied that the Court of Appeals correctly applied the guides we set out in *Bennett v. Spear* (to be "final," agency action must mark consummation of the agency's decisionmaking process," and must either determine "rights or obligations" or occasion "legal consequences. As the Court of Appeals

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[6] Similarly, the Sixth Circuit concluded in, *Allsteel Inc. v. United States EPA*, 25 F.3d 312, 315 (6th Cir. 1994), that the impact of EPA's Clean Air Act compliance order "was practical, immediate, and significant," requiring Allsteel to stop construction of its facility, preventing it "from conducting its business in an efficient manner," likely jeopardizing its business viability, and subjecting it to civil and criminal penalties if it defied the order.

> stated, *EPA had asserted its final position on the factual circumstances" underpinning the Agency's orders, and if EPA's orders survived judicial review, Cominco could not escape the practical and legal consequences (lost costs and vulnerability to penalties)* of any ADEC-permitted construction Cominco endeavored.

540 U.S. at 483 (emphasis added) (citations and parenthetical omitted).

Here, as in *ADEC*, both prongs of the *Bennett* test are met and judicial review should be allowed. The Ninth Circuit failed to even mention *ADEC*, and failed to discuss whether the order constituted final agency action, even in its analysis of the Sacketts' due process claim. This omission is particularly inexplicable because not only did this Court recognize the "practical and legal consequences" of the compliance orders, but both the Ninth Circuit and this Court allowed judicial review of the orders.

B. The Clean Water Act Does Not Preclude Pre-enforcement Judicial Review of Compliance Orders Under the Administrative Procedure Act.

Contrary to the conclusion of the Ninth Circuit, the CWA does not preclude judicial review under APA section 701(a). Availability of judicial review of final agency action is presumed absent "clear and convincing evidence" of a contrary legislative intent, *Abbott Laboratories*, 387 U.S. at 141, and the CWA does not expressly preclude pre-enforcement judicial review of

federal compliance orders. And yet the Ninth Circuit held that the presumption favoring review was overcome, finding "a congressional intent to preclude pre-enforcement judicial review of compliance orders . . . fairly discernible in the statutory scheme" of the CWA. 622 F.3d at 1144 (internal quotation marks omitted). In reaching that conclusion, the court erred in its analysis of the CWA's statutory scheme, relied on decisions from other circuits in other contexts (many of which involved other statutes), and failed to analyze *Abbott Laboratories* and its progeny. In reaching this conclusion, the Ninth Circuit also sends the CWA on a constitutional collision course with the Due Process Clause, U.S. Const. amend. V, when the Ninth Circuit should have construed the act to avoid such a result. "'[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" *SWANCC*, 531 U.S. at 173 (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

In finding that Congress intended to preclude judicial review, the Ninth Circuit relied on the structure of CWA section 309, 33 U.S.C. § 1319. *Id.* at 1142-43. Section 309 addresses compliance orders and enforcement of the Act. Subsection 309(a)(3) – enacted as part of the Federal Water Pollution Control Amendments of 1972 – authorizes the Administrator to issue a compliance order or file suit for

enforcement when he finds a violation. Although that subsection is silent as to judicial review, a later provision, subsection 309(g), added in 1987 to authorize civil penalties, provides for judicial review of a civil penalty assessment. From these two subsections, the Ninth Circuit found that "Congress's express grant of judicial review for administrative penalties helps to persuade us that the absence of a similar grant of judicial review for compliance orders was an intentional omission that must be respected." *Id.* at 1143 (citation omitted). But the court failed to note that the two subsections were enacted 15 years apart.

The Ninth Circuit's lack of detailed analysis perhaps is due to the court's reliance on several cases also devoid of careful analysis. It relied on a 1990 Seventh Circuit opinion that held that section 309 is part of a statutory scheme in which "Congress chose to make assessed administrative penalties subject to review while at the same time it chose not to make a compliance order judicially reviewable unless the EPA decides to bring a civil suit to enforce it." *Hoffman Group, Inc. v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990). Other circuits rotely followed this conclusion. *See Southern Pines Assn. v. U.S.*, 912 F.2d 713 (4th Cir. 1990); *Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation, and Enforcement*, 20 F.3d 1418, 1426 (6th Cir. 1994); *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995).

But this conclusion is incorrect. Characterizing congressional silence on judicial review of compliance orders as an "intentional omission," as the panel below

did, or as a "choice not to make a compliance order judicially reviewable," as the Seventh Circuit did, reads too much into provisions that were enacted cumulatively over a decade and a half.

A more plausible interpretation is that Congress understood CWA compliance orders to be final agency action reviewable under the APA when it enacted the 1987 amendments and that it intended reviewability to continue, seeing no need to expressly and redundantly amend other subsections to specify that compliance orders are reviewable. As of 1987, courts had held that CWA compliance orders were reviewable under the APA, and it appears that none had held otherwise. *See, e.g., P.F.Z. Properties, Inc. v. Train*, 393 F. Supp. 1370 (D. D.C. 1975); *Swanson v. United States*, 600 F. Supp. 802 (D. Idaho 1985), *aff'd*, 789 F.2d 1368 (9th Cir. 1986) and *Leslie Salt Co. v. United States*, 660 F. Supp. 183 (N.D. Cal. 1987). Because the APA unequivocally provided for judicial review of administrative compliance orders and courts were reviewing them, the "silence" in the 1987 amendments indicates that Congress intended no change in the right of judicial review. Nothing in the CWA statutory scheme supports the Ninth Circuit's conclusion that the 1987 amendments somehow repealed the then-existing right of judicial review.

The Ninth Circuit relied on and compounded the cursory analyses of the CWA by the Seventh Circuit in *Hoffman Group* and of the Fourth Circuit in *Southern Pines*, neither of which discussed the pre-1987 CWA statutory scheme. The Ninth Circuit also

compounded the earlier opinions' imprecise and inapposite comparisons to the Clean Air Act and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The earlier decisions appeared to find particularly persuasive a 1977 Eighth Circuit opinion holding that Clean Air Act compliance orders were not subject to judicial review. *See Southern Pines*, 912 F.2d at 717 (citing *Lloyd A. Fry Roofing Co. v. United States EPA*, 554 F.2d 885 (8th Cir. 1977)); *Hoffman Group*, 902 F.2d at 569 (citing *Fry Roofing* and CERCLA cases). However, they failed to note that in 1977, the same year as the Eighth Circuit decision, Congress amended the Clean Air Act to expressly provide for appellate review of "any other final action of the Administrator under this chapter."[7] And in analogizing to CERCLA, the courts overlooked an important distinction: CERCLA addresses the cleanup of releases of hazardous substances into the environment, situations where judicial review of a compliance order may delay the ability to immediately respond to a release. *Hoffman Group*, 902 F.2d at 569; *Southern Pines*, 912 F.2d at 716. The comparisons to the CERCLA statutory scheme have little applicability in construing the CWA, especially as to the reviewability of compliance orders making wetlands determinations and addressing

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[7] *See* 42 U.S.C. § 7607(b)(1); *see also* Construction and application of § 307(b)(1) of Clean Air Act (42 U.S.C.A. § 7607(b)(1)) pertaining to judicial review by courts of appeals, 86 A.L.R. Fed. 604 (1988).

the routine placement of fill in the course of land development.

Regardless of these other federal environmental statutory regimes, the courts had no basis to conclude that congressional "silence" shows intent to make them unreviewable. This conclusion stands the presumption of reviewability on its head. Before 1990, courts believed that they did have jurisdiction under the APA to review CWA compliance orders. *See, e.g.*, *P.F.Z. Properties*, 393 F. Supp. 1370 (finding, in CWA case challenging both an EPA notice of violation *and* cease and desist order, that court had jurisdiction over the case pursuant to APA sections 701-706, and holding trial on whether the agency had jurisdiction over mangrove wetlands). In short, the Ninth Circuit's analysis and conclusion that congressional silence implies intent to preclude judicial review is flawed and ignores the more plausible explanation that Congress intended judicial review to continue.

Another explanation is that Congress never contemplated or intended that the agencies would use compliance orders to force compliance with federal wetlands regulations without judicial review – that owners of property arguably not jurisdictional wetlands would be forced into the Hobson's choice of either complying at great cost or developing their lands at the peril of severe fines and damages. Instead, one might reasonably conclude that Congress intended that compliance orders would not have the force of law unless they were judicially reviewable. The Eleventh Circuit interpreted the Clean Air Act in

this way, stating that "[h]ad Congress wanted [administrative compliance orders] to have the force of law, it surely would have made them subject to judicial review." *Tennessee Valley Authority (TVA) v. Whitman*, 336 F.3d 1236, 1251 (11th Cir. 2003) (holding that because the Act's administrative compliance orders violate due process, the orders in that case were legally inconsequential, lacked finality, and therefore were not reviewable). The legislative history of section 309, while sparse, suggests that Congress did not intend compliance orders to be so widely used, and did not consider administrative convenience to outweigh landowners' ability to get judicial review of the jurisdictional basis for compliance orders in wetlands cases.[8]

The Ninth Circuit's conclusion that the "silence" in CWA section 309 conveys implicit intent to preclude judicial review also runs directly counter to this Court's admonition in *Abbott Laboratories* that "'[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. *The right to review is too important to be excluded on such slender and indeterminate evidence*

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[8] The 1972 Senate Report on CWA section 309 states: "Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay." P.L. 92-500, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, S. REP. NO. 92-414, 1972 U.S.C.C.A.N. 3668, 3730, 1971 WL 11307.

of legislative intent.'" 387 U.S. at 141 (emphasis added).

The Ninth Circuit's analysis also is inconsistent with *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). In *Thunder Basin*, the Court found that the structure of the Mine Act showed that Congress intended to preclude a miner operator's challenge to inspection rights. It found that the Mine Act established a "comprehensive review process [which] does not distinguish between preenforcement and post-enforcement challenges, but applies to all violations of the Act and its regulations." *Id.* at 208-09 (citation omitted). Further, it found that the Act "expressly authorizes district court jurisdiction in only two provisions, which respectively empower the Secretary to enjoin habitual violations of health and safety standards and to coerce payment of civil penalties. Mine operators enjoy no corresponding right but are to complain to the Commission and then to the court of appeals." *Id.* at 209 (citation and footnote omitted). No similar comprehensive scheme appears in section 309 or anywhere in the CWA evidencing an intent to preclude judicial review of administrative compliance orders.

The Ninth Circuit also failed to heed this Court's directive in *Thunder Basin* that "[w]hether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history, . . . *and whether the claims can be afforded meaningful review*." *Thunder Basin*, 510 U.S. at 207 (citations omitted; emphasis

added). Absent pre-enforcement judicial review of coercive compliance orders, claims by recipients of federal compliance orders will not be afforded any meaningful review.

The Ninth Circuit's conclusion that the CWA implicitly precludes pre-enforcement judicial review prevents consideration of the very real consequences facing the recipients of compliance orders. The circumstances in this case – a compliance order that makes a couple's construction of a family home economically unfeasible – demonstrate the consequences of unchecked federal exercise of CWA authority. Nothing in the CWA, either expressly or impliedly, suggests that Congress intended to preclude meaningful pre-enforcement judicial review of compliance orders that rest upon a federal agency's affirmative jurisdictional wetlands determination, and nothing overcomes the presumption of reviewability.

II. DUE PROCESS REQUIRES THAT RECIPIENTS OF AN EPA COMPLIANCE ORDER BE ALLOWED A PRE-ENFORCEMENT HEARING TO CHALLENGE THE EXERCISE OF FEDERAL JURISDICTION AND ENFORCEMENT AUTHORITY.

While delay in judicial review does not necessarily violate due process, delayed review is unconstitutional if "the practical effect of coercive penalties for noncompliance [is] to foreclose all access to the courts," and "compliance is sufficiently onerous and coercive penalties sufficiently potent." *Thunder Basin*,

510 U.S. at 216. To impose on a party "the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines . . . is, in effect, to close up all approaches to the courts." *Ex parte Young*, 209 U.S. 123, 148 (1908) (holding unconstitutional the provisions of an act precluding pre-enforcement judicial review of rates and associated fixed civil and criminal penalties for failure to comply with rates).

In this case, the Ninth Circuit found no violation of due process, stating that "[w]e are not persuaded that the potential consequences from violating CWA compliance orders are so onerous so as to "'foreclose all access to the courts'" and create a "'constitutionally intolerable choice.'" 622 F.3d at 1146 (quoting *Thunder Basin*, 510 U.S. at 218). But the court underestimated the scope of the agencies' power and the resulting harm to landowners. Precluding pre-enforcement judicial review buttresses a regime where EPA has assumed the authority to enjoin development by issuing unreviewable compliance orders. Such a result is repugnant to the core principle in the Due Process Clause that "[n]o person shall be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Further, application of this federal regulatory enforcement tool without judicial oversight tailgates other expansive federal regulatory action that cumulatively frustrates the States' primary authority to regulate land and

water use within their respective boundaries. 33 U.S.C. § 1251(b).

Even those courts that find that the CWA implicitly precludes pre-enforcement judicial review have noted that EPA's exercise of its compliance order authority may go too far. For example, in *Rueth v. United States Environmental Protection Agency*, 13 F.3d 227 (7th Cir. 1993), the Seventh Circuit stated: "[I]t is not inconceivable that the EPA or the Corps might completely overextend their authority. In such a case we suggest to those agencies that we will not hesitate to intervene in pre-enforcement activity." *Id.* at 231. The court's expression that it might review agency orders in certain circumstances even while holding that the CWA bars judicial review further underscores the questionable constitutionality of the barrier to judicial review that the Seventh Circuit, Ninth Circuit, and other circuits have read into the CWA.[9]

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[9] In a case involving the federal Resource Conservation and Recovery Act, another court also acknowledged that review might be mandated by due process in some cases:

> . . . [T]he Court can conceive of some pre-enforcement orders where due process concerns would be implicated. Where, for instance, the order itself is directly and irreversibly confiscatory, preventing any *meaningful* judicial review, and the agency acts in a manner which appears designed to thwart judicial review of its order, due process concerns could override an otherwise evident congressional intent to generally prohibit pre-enforcement judicial review. Indeed, these

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And the Eleventh Circuit found that the Clean Air Act violates due process in similar circumstances. In *T.V.A. v. Whitman*, after finding that the Clean Air Act implicitly precluded pre-enforcement judicial review of administrative compliance orders, the court held that "the statutory scheme is unconstitutional to the extent that severe civil and criminal penalties can be imposed for noncompliance with the terms of an [administrative compliance order]." 336 F.3d at 1239. Consideration of the "legal consequences" of the order is necessary in order to determine whether the agency's order was "final," and "[o]nly if noncompliance with the terms of [the order] amounts to an independent violation of the Clean Air Act (thus triggering civil penalties and criminal sanctions) can an [order] be said to have legal consequences" and finality. *Id.* at 1257. Thus, where the compliance order has the force of law, (that is, where noncompliance with the order itself, regardless of the underlying CWA determination that led EPA to issue the order, exposes the recipients to imposition of severe civil and criminal penalties), opportunity for meaningful judicial review must be allowed.

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were the precise circumstances Judge Wellford found present in the *Allsteel* case when he premised his concurrence on due process grounds.

Armco v. United States EPA, 124 F. Supp. 2d 474, 478 (N.D. Ohio 2000) (emphasis in original) (citing *Allsteel*, 35 F.3d at 316).

As this Court held in *Fuentes v. Shevin*,

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of possessions. . . . [T]he prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.

407 U.S. 67, 80-81 (1972).

In this case, the Sacketts purchased a small lot and had all local permits in hand to construct a modest home in the midst of a residential area where some development had already occurred. EPA ordered the Sacketts to cease construction, undo the work they had already completed, restore the property to its original condition, and then conduct a three-year environmental monitoring review of the property. Only then will they be eligible to engage in the section 404 process to obtain a permit that they do not believe is required, that may not be granted, and that may contain provisions so onerous that it effectively forecloses development.[10] And if they defy the order, they face significant civil and criminal penalties, including enormous fines. As petitioners noted in

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[10] 33 C.F.R. § 326.3(e)(1)(ii) provides that no application under the CWA can be accepted until a compliance order is resolved.

their Petition for Writ of Certiorari, at 10, "[j]ust one month of noncompliance puts the landowner at risk of civil liability of $750,000. A year's worth of noncompliance puts the liability at $9,000,000."

The order issued to the Sacketts has a "practical and immediate effect," represents EPA's "last word" on its wetlands determination,[11] and will result in a "serious prehearing deprivation" of a constitutionally protected interest. *Thunder Basin*, 510 U.S. at 781. If the Court concurs with the Ninth Circuit that the statutory scheme precludes review under the APA, then due process nonetheless requires that the Sacketts receive meaningful opportunity to be heard before deprivation of their property interest. *See Mathews v. Eldridge*, 424 U.S. 319 (1976) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

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[11] *See, e.g., ADEC*, 540 U.S. at 481-83 (ruling that EPA's determination of what equipment would comply with Clean Air Act requirements was final); *Allsteel*, 25 F.3d at 314-15 (finding that "the balance tips in favor of the conclusion that the stop-work order is a final action"); *Harrison v. PPG Industries*, 446 U.S. 578, 586 (1980) (holding "EPA's determination concerning the applicability of the 'new source' standards to PPG's power facility" was final agency action).

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

CHANTELL SACKETT and MICHAEL SACKETT,
Petitioners,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
and LISA P. JACKSON, Administrator.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE EPA'S COMPLIANCE ORDER VIOLATED THE DUE PROCESS RIGHTS OF THE SACKETTS	6
II. CONGRESS DID NOT INTEND TO LEAVE THE SACKETTS WITHOUT A CONSTITUTIONAL REMEDY UNDER THE ADMINISTRATIVE PROCEDURE ACT	12
CONCLUSION	15

TABLE OF AUTHORITIES

CASES Page

Abbot Labs v. Gardner, 387 U.S. 136 (1967) 13, 14
Alaska Department of Environmental Conservation v. EPA, 540 U.S. 461 (2004) 13
Board of Regents v. Roth, 408 U.S. 564 (1972) 7
Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) 13, 14
Davidson v. New Orleans, 96 U.S. 97 (1877) 7
Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) 12
Ex Parte Young, 209 U.S. 123, 148 (1908) ... 10
Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) 6, 10
Fuentes v. Shevin, 407 U.S. 67 (1972) 7
Goldberg v. Kelly, 397 U.S. 254 (1970) 7
Mathews v. Eldridge, 424 U.S. 319 (1976) .. 7
McNary v. Haitian Refugee Ctr., Inc. 498 U.S. 479 (1991) 14
MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118 (2007) 10
Nat'l Labor Relations Bd. v. Un. Food & Comm. Workers Union, 484 U.S. 112 (1987) 14
Ochoa v. Hernandez y Morales, 230 U.S. 139 (1913) 7
Rapanos v. United States, 547 U.S. 715 (2006) 8
Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1 (2000) 14

TABLE OF AUTHORITIES—Continued

Page

Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) 7
Tennessee Valley Authority v. Whitman, 363 F. 3d 1236 (11th Cir. 2003) 4, 9
Thunder Basin Coal Co. v. Raich, 510 U.S. 200 (1994) 9, 10, 14
Wilkinson v. Leland, 27 U.S. 627 (1829) 7

STATUTES

Clean Water Act, Section 1319(c)(1)-(2) 9

REGULATIONS

33 C.F.R. Sect. 326.3(e)(1)(ii) 8

OTHER AUTHORITIES

Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 Envtl. L. 189, 223 (1994) 10
Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: 1985) 11
Christopher M. Wynn, Note, *Facing a Hobson's Choice? The Constitutionality of the EPA's Administrative Compliance Order Enforcement Scheme Under the Clean Air Act*, 62 Wash. & Lee L. Rev. 1879, 1920 (2005) 11

INTEREST OF THE *AMICUS CURIAE* [1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

This case is of interest to the ACRU because we want to ensure that all constitutional rights are fully protected, not just those that may advance a particular ideology. That includes the rights to property and to Due Process of Law protected by the Fifth Amendment.

STATEMENT OF THE CASE

Petitioners Chantell and Michael Sackett purchased a half-acre lot in a built-out area of residential development near Priest Lake, Idaho for the purpose of building their home on the property. Pet. App. A-2, E-2. Local authorities zoned their lot for residential construction, and provided an existing sewer hookup. Pet. App. E-2.

Obtaining all required building permits from the local authorities, the Sacketts employed contractors who began earthmoving work to prepare the site for home construction. Without any reason to think that such home construction activities on the dry land of their residential property in a residentially developed neighborhood involved the Clean Water Act (CWA) or the Environmental Protection Agency (EPA), Pet. App. E-2, the Sacketts nevertheless received a Compliance Order from the EPA effectively ruling *ex parte* that their home building activities had violated the CWA by illegally dumping fill materials into jurisdictional wetlands supposedly on their land. Pet. App. G. Somehow, the EPA found that the Sacketts moving earth around on their residential lot in a residential neighborhood involved "the discharge of a pollutant" into the "navigable waters" of the United States.

The Compliance Order required the Sacketts to immediately cease construction of their home, despite building authorization from the local authorities. Indeed, the Compliance Order required them instead to finance costly restoration work, removing all fill material and replanting, followed by a three-year monitoring period during which the Sacketts had to leave their residential land entirely untouched. Pet. App. G-4 – G-6, H-3. In addition, the Compliance Order imposed costly civil penalties on the Sacketts if they failed to comply with the Order's dictates. Pet. App. G-7.

The Sacketts next found that there was nowhere they could challenge the EPA's Compliance Order, at least without incurring costs and delays suited to a major industrial enterprise rather than to a retiring couple trying to build a modest home, or inviting bankrupting fines and even criminal penalties. The Sacketts first sought a hearing before the EPA. But the EPA ignored them. Pet. App. 3. The Sacketts then filed suit in federal court. But the District Court granted the EPA's motion to dismiss the suit. Pet. App. at C-7.

The Sacketts appealed the dismissal to the Ninth Circuit. Despite the general presumption of judicial review of administrative actions, the court held that the CWA precludes judicial review of pre-enforcement actions such as Compliance Orders. Pet. App. 6.

The Sacketts argued that this would mean that the CWA authorizes liability for violations of Compliance Orders, even where the CWA has not been violated.

The Eleventh Circuit held in *Tennessee Valley Authority v. Whitman*, 363 F. 3d 1236 (11th Cir. 2003) in regard to an analogous section of the Clean Air Act (CAA) that such Compliance Orders would be unconstitutional if not subject to judicial review. But the Ninth Circuit read into the statute the right to challenge the validity of a Compliance Order if and when the EPA chooses to enforce it, and held that this satisfies constitutional requirements.

The court's ruling leaves the Sacketts then with only this choice. They can seek a permit from the EPA to discharge pollution into the navigable waters of the United States by building their home on a residential lot in a residential neighborhood, as a major industrial enterprise would have to do for real pollution, practically costing more than their property is worth and years of delay in the construction of their own home. Or they can ignore and violate the Compliance Order, incurring overwhelming civil penalties and even quite possibly criminal liability, hoping that a court would use its equitable discretion to set that aside.

The Sacketts requested a Writ of Certiorari from this Court, which was granted on June 28, 2011.

SUMMARY OF ARGUMENT

Petitioners Chantell and Michael Sackett purchased a residential lot in a residential neighborhood, zoned and permitted by local authorities for construction of their home. After they began earthwork

prepatory to such construction, they received a Compliance Order from the EPA effectively ruling that moving around dry earth and fill materials on their residential lot to begin their homebuilding project somehow involved discharge of a pollutant into the navigable waters of the United States in violation of the Clean Water Act. The Compliance Order commanded the Sacketts to cease construction of their home, bear the costs of restoring the property to its previous condition, undoing all of their construction activity, and leave the property untouched for a period of years, with no clear opportunity ever to commence building.

The Sacketts were denied any hearing to contest the Compliance Order by the EPA and by the courts below. The Ninth Circuit held that to get a hearing the Sacketts had the choice of bearing the intractable costs of applying for a permit to discharge pollution into the navigable waters of the United States by building their home on a residential lot, as if they were a major industrial enterprise actually engaged in real pollution, and then seek judicial review of any such denial, with no prospect of getting back the intractable costs of any such application. Or they could ignore the Compliance Order, running the risk of bankrupting fines and even criminal liabilities, and then raise their contesting claims in an enforcement action.

This Hobson's choice violates the constitutional requirements of Due Process of Law, which unquestionably protect Petitioners' property interest in building their own home. It involves a regulatory taking as well in violation of the Takings Clause, as

the Sacketts are indefinitely denied the use of their property for the residential purpose for which they purchased it, and any other meaningful use, effectively leaving them required to maintain it as a public park indefinitely. The Sacketts represent one example of potentially thousands of similar constitutional violations across the country.

Consequently, we submit the ruling of the Ninth Circuit below should be reversed.

ARGUMENT

I. THE EPA'S COMPLIANCE ORDER VIOLATED THE DUE PROCESS RIGHTS OF THE SACKETTS.

This case is about the EPA effectively taking the planned home of Petitioners Chantell and Michael Sackett in a manner reminiscent more of an authoritarian government than a liberal society governed by Due Process and property rights. The Sacketts are not the DuPont Chemical Company able to finance the application for a discharge permit, merely to build their own home on a residential lot in a residential neighborhood. Moreover, such home construction manifestly does not involve discharge of pollution into the navigable waters of the United States, and the Constitution requires that the Sacketts be allowed their day in court to raise that defense without incurring bankrupting EPA civil penalties, and quite possibly criminal liability, which they could only hope a court will equitably set aside. *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010).

That Hobson's choice violates the Fifth Amendment's Due Process Clause. The property rights of homeowners are unquestionably protected by Due Process. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Ochoa v. Hernandez y Morales*, 230 U.S. 139 (1913); *Davidson v. New Orleans*, 96 U.S. 97 (1877); *Wilkinson v. Leland*, 27 U.S. 627 (1829); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969). Due process requires a meaningful opportunity to be heard before deprivation of a property interest. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970). As this Court said in *Fuentes*,

> "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of possessions....[T]he prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference."

407 U.S. at 80-81. The Court in *Fuentes* added further, "[T]he central meaning of procedural due process [is that] 'parties whose rights are to be affected are entitled to be heard.'" 407 U.S. at 80.

The Sacketts have been undeniably denied a property interest. They purchased a residential lot in a residential neighborhood for the purpose of building a home. But the EPA's Compliance Order denies

them the right to build a home on their property, forcing them instead to maintain it effectively as a public park at their own expense, at a minimum for years. Moreover, since the EPA has already held that taking steps to prepare for the building of a home on the Sacketts' land somehow involves illegally discharging pollution into the navigable waters of the United States, there is no reason to believe that absent judicial intervention the Sacketts will ever be free to build their home.

The EPA's Compliance Order was issued with no notice or opportunity to be heard for the Sacketts. The Sacketts were consequently denied any opportunity to present any defenses or facts on their behalf. And at present, the Sacketts have no feasible recourse to get their defenses to an apparently confused EPA ruling even before a court to be heard. Under present EPA regulations, the Sacketts cannot even apply for a permit as the Ninth Circuit suggested. Once a Compliance Order has been issued, EPA regulations provide that "No permit application will be accepted" until the Compliance Order has been resolved. 33 C.F.R. Sect. 326.3(e)(1)(ii). Moreover, even if a permit application would be allowed, that is not remotely a practical, feasible option for the Sacketts. The average application for an individual permit costs $271,596 and takes 788 days, or more than 2 years. *Rapanos v. United States*, 547 U.S. 715, 721 (2006)(plurality opinion).

In addition, there is no guarantee that after all of those costs and all of that delay, the permit to build their home would be granted, or granted with feasible

conditions. If the Sacketts then have to sue after a permit denial to finally get their objections heard by a court, and the court ruled that the Sacketts were right after all, they would have no recourse to get any of those unbearable permit application costs back. As Justice Scalia recognized in *Thunder Basin Coal Co. v. Raich*, 510 U.S. 200, 220-21 (1994)(concurring in part and concurring in the judgment), "[C]omplying with a regulation later held to be invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs."

Alternatively, the Sacketts can ignore the EPA's Compliance Order and seek to raise their defenses when the EPA moves to enforce it. That course entails incurring EPA fines of as much as $750,000 per month, $9,000,000 for a year, for failure to obey the Compliance Order. Moreover, under the federal CWA statute, the Sacketts would have to run the risk of criminal liability as well, as Section 1319(c)(1)-(2) imposes criminal penalties for knowing violations of the Act. Yet, there is no guarantee that in such an enforcement action a right to raise defenses to the Compliance Order would be read into the CWA, as the Ninth Circuit did in this case, especially when the plain language of the statute unambiguously precludes it. Much less is there any assurance that a later court in such an enforcement action would disallow any fine on equitable grounds.

These reasons are exactly why the Eleventh Circuit in *TVA v. Whitman* found such a Hobson's choice imposed by an EPA Compliance Order under a perfectly analogous provision of the CAA to be an

unconstitutional violation of the Due Process Clause. The same result is mandated by the opinion of this Court in *Thunder Basin*, where the Court concluded that lack of judicial review is unconstitutional where "the practical effect of coercive penalties for non-compliance is to foreclose all access to the courts," and where "compliance is sufficiently onerous and coercive penalties sufficiently potent." 510 U.S. at 216.

Indeed, over 100 years ago this Court similarly ruled in *Ex Parte Young*, 209 U.S. 123, 148 (1908) that requiring a party to bear "the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts" would be unconstitutional because it would effectively "close up all approaches to the courts." After almost exactly 100 years had passed, this Court again ruled in a similar situation in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) that "Given this genuine threat of enforcement, we did not require, as a prerequisite to testing the validity of the law in a suit for injunction, that the plaintiff bet the farm, so to speak, by taking the violative action." *Accord: Free Enterprise Fund.*

Commentators have recognized the wisdom in these opinions. Davis writes, "The absence of direct review of compliance orders effectively coerces a recipient to comply with the order prior to EPA enforcement." Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 Envtl. L. 189, 223 (1994). Similarly, Wynn writes that compliance

orders "can coerce a regulated party into a Hobson's choice: Complying with the order may create an enormous financial burden on a company while the company awaits possible EPA enforcement, while ignoring the order may subject the party to severe criminal and civil penalties." Christopher M. Wynn, Note, *Facing a Hobson's Choice? The Constitutionality of the EPA's Administrative Compliance Order Enforcement Scheme Under the Clean Air Act*, 62 Wash. & Lee L. Rev. 1879, 1920 (2005).

The Sacketts do not represent an isolated case of such bureaucratic abuse. From 1980 to 2001, the EPA issued 1,500 to 3,000 Compliance Orders each year across the country. Wynn, *supra*, at 1895.

Moreover, besides Due Process issues, this case involves Takings Clause concerns as well. The Sacketts purchased a residential lot in a residential neighborhood for the purpose of building a home. The arbitrary EPA Compliance Order that does not remotely seem to be grounded in any reasonable reading of the law deprives the Sacketts not only of that use of their property, but of any other reasonable use as well, for an indefinite period at least. We submit that this Court should rule that such an abominable bureaucratic abuse does involve a regulatory Taking in violation of the Constitution. Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: 1985).

Ultimately, all that Petitioners are asking for in this case is an opportunity for their day in court to

present their defenses to an EPA enforcement action which seems on its face to involve an arbitrary misreading of the law. The Due Process Clause of the Constitution requires that the Sacketts be allowed to present evidence as to whether construction of a family home on a dry residential lot in the middle of a built out residential neighborhood constitutes discharge of a pollutant into the navigable waters of the United States.

II. CONGRESS DID NOT INTEND TO LEAVE THE SACKETTS WITHOUT A CONSTITUTIONAL REMEDY UNDER THE ADMINISTRATIVE PROCEDURE ACT.

The unconstitutional violation of the Due Process rights of the Sacketts described above can be entirely avoided by interpreting the CWA as not foreclosing judicial review of EPA compliance orders under the APA. This Court has long held that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

That cardinal rule of statutory construction goes all the way back to Chief Justice John Marshall, directing that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Id.* (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895). That approach

"recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. [The Court] will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties." *Id.*

Moreover, reading the CWA and the APA as providing for judicial review of the EPA Compliance Order regarding the Sacketts is, in fact, the most natural reading of Congressional intent in regard to those Acts. As this Court said in *Abbot Labs v. Gardner*, 387 U.S. 136, 140 (1967), the APA "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" The Court added further in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), "We begin with the strong presumption that Congress intends judicial review of administrative action."

In addition, Congress expressly designed the APA to provide for judicial review of final agency action, 5 U.S.C. Sect. 704, which is exactly what the Compliance Order is in this case. *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004)("*ADEC*"). The Compliance Order issued to the Sacketts involves a final decision in their case, the culmination of the EPA's decision making process. There is no further administrative process that would provide any review of the order.

Indeed, the Compliance Order already imposes defined legal consequences on the Sacketts. *ADEC*, 540 U.S. at 483. The Order is immediately enforce-

able in court by the EPA against the Sacketts, with sanctions and penalties to be imposed. Section 309(b).

But the leading factor in determining the availability of judicial review under the APA is whether the party can otherwise obtain meaningful judicial review. *See Thunder Basin*, 510 U.S. at 207; *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984); *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1 (2000). That is based on the fundamental presumption that Congress would not intend to foreclose meaningful judicial review and thereby deny Due Process. *McNary v. Haitian Refugee Ctr., Inc.* 498 U.S. 479 (1991). But as discussed above, without review under the APA, there is no meaningful review available to the Sacketts, and the CWA as interpreted and enforced by the EPA against the Sacketts would involve an unconstitutional violation of their Due Process rights.

Finally, Congressional intent to deny judicial review will not be presumed unless clearly and unmistakably expressed in the statute. As this Court said in *Abbot Labs*, "[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." 387 U.S. at 140. The Court added in *Nat'l Labor Relations Bd. v. Un. Food & Comm. Workers Union*, 484 U.S. 112, 131 (1987), "The statutory preclusion of judicial review must be demonstrated clearly and convincingly." In addition, "where substantial doubt about the congressional intent exists, the general presumption favoring

judicial review of administrative action is controlling." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986).

But even the Ninth Circuit admitted that nothing in the language of the CWA specifically precludes judicial review of EPA Compliance Orders. Nothing in the legislative history of the Clean Water Act either provides any specific statement evidencing Congressional intent to deny judicial review of EPA Compliance Orders under the APA.

CONCLUSION

For all of the foregoing reasons, *amicus curiae* American Civil Rights Union respectfully submits that this Court should reverse the ruling of the Ninth Circuit below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 10-1062

In the Supreme Court of the United States

CHANTELL SACKETT, ET VIR, PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE AMERICAN FARM BUREAU FEDERATION, NATIONAL COUNCIL OF FARMER COOPERATIVES, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, AND PUBLIC LANDS COUNCIL AS *AMICI CURIAE* SUPPORTING PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

A. EPA's Broad Interpretation Of The Clean Water Act Subjects Routine Agricultural Activities To Regulation 5

B. The Administrative Procedure Act Provides For Judicial Review Of Administrative Compliance Orders 10

1. The Clean Water Act Does Not Implicitly Revoke APA Review Of Administrative Compliance Orders 11

2. The Sacketts' ACO Was "Final Agency Action" Subject To APA Review 14

C. CWA Permitting Is So Costly And Slow As To Foreclose Access To The Courts 23

D. Requiring Landowners To Seek CWA Permits To Obtain Review Of Administrative Compliance Orders Subjects Them To A Constitutionally Intolerable Choice 34

CONCLUSION 38

TABLE OF AUTHORITIES

Page(s)

Cases

A.A. Profiles, Inc. v. *City of Ft. Lauderdale*,
850 F.2d 1483 (11th Cir. 1988).....19

Abbott Labs. v. *Gardner*,
387 U.S. 136 (1967).....10, 12, 13, 14

Alaska Dep't of Envtl. Conservation v. *EPA*,
540 U.S. 461 (2004).....12, 20

Armstrong v. *Manzo*,
380 U.S. 545 (1965).....34

Barrick Goldstrike Mines, Inc. v. *Browner*,
215 F.3d 45 (D.C. Cir. 2000).....20

Bennett v. *Spear*,
520 U.S. 154 (1997).....15

Block v. *Community Nutrition Inst.*,
467 U.S. 340 (1984).....11

Borden Ranch P'ship v. *Corps of Eng'rs*,
261 F.3d 810 (9th Cir. 2001) 8

Bowen v. *Michigan Acad. of Family Physicians*,
476 U.S. 667 (1986).....10, 13

Clark v. *Martinez*,
543 U.S. 371 (2005).....14

Cook Cnty. v. United States ex rel. Chandler,
538 U.S. 119 (2003).....13

TABLE OF AUTHORITIES–Cont'd

Page(s)

CSI Aviation Servs., Inc. v. *United States Dep't of Transp.*,
637 F.3d 408 (D.C. Cir. 2011).....15, 20

Ellis v. *Bhd. of Ry., Airline & S.S. Clerks*,
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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are trade associations whose members make their livelihoods through farming and ranching activities.

The American Farm Bureau Federation ("AFBF") is the nation's largest not-for-profit, voluntary general farm organization. Since 1919, AFBF has worked to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF members produce every type of agricultural crop and commodity grown in the United States, and the organization represents more than six million member families through member organizations in all 50 States and Puerto Rico.

The National Council of Farmer Cooperatives ("NCFC") has been the voice of America's farmer cooperatives since its formation in 1929. Farmer cooperatives handle, process, and market almost every type of agricultural commodity; furnish farm supplies; and provide credit and related financial services. NCFC's members are regional and national farmer cooperatives, which in turn comprise nearly 3,000 local farmer cooperatives—local organizations owned and operated by farmers, ranchers, and growers. The majority of America's two million

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief, in whole or part, and no counsel for a party or party made a monetary contribution to fund the preparation or submission of this brief. No entity or person, aside from the *amici curiae* and its counsel, made any monetary contribution for the preparation or submission of this brief. Counsel for the parties consented to this filing.

farmers and ranchers belong to one or more farmer cooperatives.

The National Cattlemen's Beef Association ("NCBA") is the marketing organization and trade association for America's cattle farmers and ranchers. Established in 1898, NCBA represents 147,000 of America's cattle producers through direct membership and state affiliate and breed organizations, which provide much of the nation's food. NCBA promotes responsible stewardship of America's land and natural resources.

The Public Lands Council ("PLC") has represented livestock ranchers who use public lands since 1968, preserving the natural resources and unique heritage of the West. PLC works to maintain a stable business environment in which livestock producers can conserve the West and feed the nation and world. Public land ranchers own nearly 120 million acres of the most productive private land and manage vast areas of public land that constitute a critical wildlife habitat and a natural resource.

Federal regulators have classified much farm and ranch property as "wetlands" or other "waters of the United States," thereby subjecting it to onerous regulation under the Clean Water Act. That regime restricts the ability of farmers and ranchers to cultivate and graze their livestock on it, and to build and maintain such necessary improvements as ponds, lagoons, ditches, and holding structures as part of ordinary farming and ranching activities. *Amici* and their members thus have a strong interest in federal enforcement of the Clean Water Act and, specifically, in the ability of farmers and ranchers to obtain

prompt judicial review of administrative compliance orders issued under the Act.

SUMMARY OF ARGUMENT

A. "Normal agricultural activities" are exempt from the onerous regulatory regime of the Clean Water Act (CWA). As the CWA has been recently interpreted and applied by EPA and the Army Corps of Engineers, however, it does just the opposite. In designated areas, those regulators have claimed, for example, authority to determine how deep is too deep to plow a field without a permit. So too for earthen ditch crossings and "squaring off" fields, among other daily activities. The CWA has, in short, become a tool for regulators to micromanage even the most routine decisions of farmers and ranchers.

B. The APA's provision of judicial review of Administrative Compliance Orders (ACOs) is essential to check such overreaching. This Court has long demanded clear and convincing evidence that Congress did not intend judicial review of administrative action. The CWA gives EPA a choice between issuing an ACO or filing suit, but that choice does not evaporate if a landowner may seek judicial review of an ACO—it just means that the underlying merits of the regulators' position will face meaningful scrutiny. Likewise, it would turn the clear-and-convincing-evidence standard on its head to conclude that the CWA's express provision for review of administrative penalties proves that Congress definitively meant to preclude it everywhere else.

The ACO issued to the Sacketts was undoubtedly "final agency action" subject to APA review. It issues

a series of direct commands that must be performed immediately, and it purports to be EPA's final word. Unsurprisingly, this order has a "direct and immediate" effect on the Sacketts' daily business. ACOs introduce serious uncertainty regarding permissible uses of land, and property values suffer accordingly. And then there are the massive costs associated with compliance—demanded on pain of even more severe civil and administrative penalties. Landowners are thus coerced into undertaking hugely expensive measures without judicial oversight.

C. The CWA permitting process offers no meaningful relief. Seeking an individual permit from the U.S. Army Corps of Engineers requires landowners to navigate a maze of forms and submission requirements, many of which require the services of lawyers, engineers, and consultants at significant expense. One study revealed that the mean cost for such work approaches $300,000, not including the actual costs of any remediation or other work required. And these permits take, on average, more than *two years* to issue. Nationwide permits are no better. Their scope is exceedingly narrow, and the burdens of giving "pre-construction notification" to the Corps are nearly as onerous as seeking an individual permit and likewise result in long delays. As a practical matter, then, the CWA permitting process forecloses landowners' access to the courts.

D. The effect of all this is to subject landowners to a constitutionally intolerable choice. They can (1) submit to regulators' demands (usually at great expense) without any determination that such action is required by law; (2) risk catastrophic fines for non-compliance; or (3) expend significant time and

resources (upwards of two years and tens—and perhaps hundreds—of thousands of dollars) pursuing a CWA permit. That is no choice at all.

ARGUMENT

A. EPA's Broad Interpretation Of The Clean Water Act Subjects Routine Agricultural Activities To Regulation

1. The CWA authorizes EPA and the Army Corps of Engineers to regulate "the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). "Discharge" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12), (16). Any such discharge requires a federal permit.

Because of concerns that the Federal Water Pollution Control Act of 1972 ("FWPCA")—the predecessor of the CWA—would be interpreted to provide that "federal permits may be required by the rancher who wants to enlarge his stock pond, or the farmer who wants to deepen an irrigation ditch or plow a field," Dep't of the Army, Office of Chief of Engineers, Press Release (May 6, 1975), the Corps of Engineers in 1975 issued regulations exempting "normal" agricultural activities from its scope. The Corps thus excluded from its definition of "dredged material" and "fill material" any "[m]aterial resulting from normal farming, silv[i]culture, and ranching activities, such as plowing, cultivating, seeding, and harvesting, for the production of food, fiber, and forest products." 33 CFR § 209(d)(4), (6) (1975); see also 40 Fed. Reg. 31,320, 31,321 (July 25, 1975). As Assistant Secretary of the Army Victor Veysey told a

House subcommittee in 1975, "[w]e must dispel fallacies that the Corps is proposing to regulate a farmer plowing his field." *Corps Issues Interim Rules For Discharges of Dredged and Fill Materials*, 5 Envtl. L. Rep. 10143 (1975).

Congress codified the Corps' regulations in the 1977 FWPCA amendments, which redesignated those provisions the "Clean Water Act." The Corps explicitly exempted any "discharge" "from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices." 33 U.S.C. § 1344(f)(1)(A). Members of Congress emphasized that the Corps' regulations had correctly concluded that "normal farming, ranching, and silviculture activities do not belong in this permit program." Report on Resolution Providing for Consideration of Conference Report on H.R. 3199, Clean Water Act of 1977, at 351 (statement of Rep. John Hammerschmidt); accord, *e.g.*, *id.* at 524 (stating that the bill "clarifies the exclusion of activities that do not involve point source discharges") (statement of Sen. Howard Baker). The amendments also included a provision (sometimes referred to as the "recapture" provision) that requires permitting where the discharge of dredged or fill material has the purpose of "bringing an area of the navigable waters into a use to which it was not previously subject" where "the flow or circulation of navigable waters may be impaired or the[ir] reach * * * reduced." 33 U.S.C. § 1344(f)(2).

2. Despite the Act's unambiguous exemption for "normal agricultural activities," the Corps and EPA

have asserted authority over a variety of routine agricultural activities that in some way affect "navigable waters." The statute defines that term as "the waters of the United States, including the territorial seas," 33 U.S.C. § 1362(7); the Corps, however, has broadly defined it to include "mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows * * * the use, degradation or destruction of which could affect interstate or foreign commerce * * * ." 33 CFR § 328.3(a)(3). The Corps and EPA have interpreted those terms broadly, "stretch[ing] the term 'waters of the United States' beyond parody," *Rapanos* v. *United States*, 547 U.S. 715, 734 (2006) (plurality opinion), and resulting in an "immense expansion of federal regulation of land use * * * under the Clean Water Act—without any change in the governing statute." *Id.* at 722 (plurality opinion); accord *Solid Waste Agency of N. Cook Cnty.* v. *Corps of Eng'rs*, 531 U.S. 159 (2001).

Those agencies' regulation of agricultural activities is so widespread that it would be impossible to fully catalogue their efforts in the context of an amicus brief. But a few examples give a sense of the breadth of the agencies' regulatory efforts:

- Although the statute explicitly excludes "plowing," 33 U.S.C. § 1344(f)(1), and although courts have rejected the proposition that the incidental fallback of native soil constitutes the "addition" of pollutants, *e.g.*, *National Mining Ass'n* v. *Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998), EPA and the Corps have required farmers to seek permits before "deep plowing" land already used for grazing and raising alfalfa, wheat, and hay, to prepare it for

growing fruit crops or nuts. See *Borden Ranch P'ship* v. *Corps of Eng'rs*, 261 F.3d 810, 815–816 (9th Cir. 2001) (accepting agencies' interpretation), aff'd by an equally divided court, 537 U.S. 99 (2002). In the experience of *amici*, the Corps has rarely approved such permits, and has done so only after substantial delay. The Corps recently further narrowed its reading of the agricultural exception, telling farmers that use of a basic disc plow—the ubiquitous tool used to prepare soil for planting—may require a CWA permit when used to prepare the soil for planting nut trees. The Corps previously considered disc use "exempt activity" under the agricultural exception.[2]

- The agencies have asserted that pushing soil into a small portion of an existing ditch or dry wash to create a small earthen bridge so that farm equipment can access a field requires a CWA permit. See, *e.g.*, Testimony of James K. Chilton, Jr., before the Committee on Small Business of the U.S. House of Representatives, July 22, 2009 ("Chilton Testimony"), at 4-5.

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[2] Compare Corps of Engineers, *Memorandum for Record, Meeting Summary – California Agriculture and CWA Jurisdiction*, Sept. 1, 2010, at 2 ("[C]onversion from annual row crops or pasture to tree and vine crops often involves discing or deep ripping and may trigger the recapture clause.") with Letter from Michael S. Jewell, Chief, Central California/Nevada Section, Corps of Engineers, to Dave Bauer, July 6, 2001 ("[Y]our proposal to disc your property * * * is considered an exemption activity under Section 404 * * * .").

- Farmers may seek to increase efficiency by cultivating portions of their existing fields adjacent to those actively farmed but that have fallen into disuse—sometimes because of the wide turning radius of large modern tractors, sometimes because of irregularities in the shape of fields manually cleared before mechanization. EPA has taken the position that "squaring off existing * * * fields" in this way requires a CWA permit. *E.g.*, *Filling Wetlands Costly for Vermont Dairy Farmers*, Env't News Serv. (Sept. 8, 2008), *available at* http://www.ens-newswire.com/ens/sep2008/2008-09-07-092.asp.

- Although the CWA explicitly exempts "minor drainage" from the scope of activity requiring a permit, and although one of the Act's principal sponsors stated that that provision would permit "draining poorly drained farm[land]," *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Water Pollution Control Act* (1978), at 1042 (statement of Sen. Edmund Muskie), EPA and the Corps have construed that provision not to include any construction of drainage in wetlands. Rather, they construe the provision as "limited to discharges associated with the continuation of established wetland crop production" and drainage of "upland" (*i.e.*, dry land) discharges. EPA and Corps of Engineers, *Memorandum: Clean Water Act Section 404 Regulatory Program and Agricultural Activities*, May 3, 1990, *available at* http://water.epa.gov/lawsregs/guidance/wetland

> s/cwaag.cfm. Thus, this exemption has been interpreted not to permit any new wetland drainage, however "minor."

In short, the Corps and EPA have interpreted the CWA's exemption for "normal agricultural activities" to permit farmers and ranchers to continue only with their operations as they stood in 1977. Any change in activity to expand, however trivially, acreage in cultivation; to dig even a short new drainage ditch in an area classified as wetlands; to allow a tractor to cross a ditch; or to allow cattle to graze more broadly, potentially triggers the application of CWA jurisdiction to activity that is unquestionably a "normal" part of everyday agricultural activities.

B. The Administrative Procedure Act Provides For Judicial Review Of Administrative Compliance Orders

Statutory construction "begin[s] with the strong presumption that Congress intends judicial review of administrative action." *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986); accord *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001) (same). The Administrative Procedure Act "embodies the basic presumption of judicial review," such that statutes will be construed to preclude judicial review of an agency action "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 140–141 (1967); H.R. Rep. No. 1980, 79th Cong., 2d. Sess., at 41 (1946) (discussing APA) ("To preclude judicial review * * * a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it."). As

the Ninth Circuit acknowledged, Pet. App. A-6, the CWA does not expressly "preclude judicial review" (5 U.S.C. § 701(a)(1)) of ACOs. Thus, "'clear and convincing evidence'" of congressional intent to preclude judicial review must be found, if at all, from the "structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Lindahl* v. *Office of Pers. Mgmt.*, 470 U.S. 768, 778–779 (1985) (quoting *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 345 (1984)). The Ninth Circuit inferred Congress's intent to repeal by implication the APA's generally applicable review provisions simply because the Clean Water Act gives EPA a choice between issuing an ACO *or* bringing an enforcement action in district court, see generally 33 U.S.C. § 1319(a)(3). According to the Ninth Circuit, allowing judicial review of ACOs "would eliminate this choice." Pet. App. A-7. The court found further evidence of Congress's intent in the CWA's express provision for judicial review of administrative penalties. *Id.* at A-8. The Ninth Circuit's conclusion was fundamentally mistaken.

1. The Clean Water Act Does Not Implicitly Revoke APA Review Of Administrative Compliance Orders

Allowing judicial review of administrative ACO determinations honors the government's choice to proceed in the first instance through the streamlined administrative process rather than in an enforcement proceeding in federal court. The government would still derive all the benefits of its choice of initial factfinder and factfinding mechanism. Cf. *Alaska Dep't of Envtl. Conservation*

v. *EPA*, 540 U.S. 461, 493–494 (2004). Indeed, for a variety of reasons (including the expense of seeking judicial review) a significant number of administrative actions would never find their way into court.

For similar reasons, the Ninth Circuit erred in its conclusion that allowing judicial review of the Sacketts' ACO would impair EPA's ability "'to address environmental problems quickly and without becoming immediately entangled in litigation.'" Pet. App. A-8 (quoting *S. Pines Assocs.* v. *United States*, 912 F.2d 713, 716 (4th Cir. 1990)). For a variety of reasons (including the expense of seeking judicial review), most landowners could be expected not to seek review of their ACO, particularly in instances where the alleged violation of the CWA is clear—which is precisely when agencies need to act "quickly." *Ibid.* And except in those rare instances in which the landowners meet the high standards for preliminary relief, the ACO would remain in effect during the litigation.

Nor does the CWA's explicit statutory review for administrative penalties provide the requisite "clear and convincing evidence" that Congress intended to foreclose the ordinary avenue of APA judicial review. See Pet. App. A-8. Because the APA "manifests a congressional intention that it cover a broad spectrum of administrative actions," this Court has held that the statute's "generous review provisions must be given a hospitable interpretation." *Abbott Labs.*, 387 U.S. at 140–141 (internal quotation marks omitted). Accordingly, "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others." *Id.*

at 141 (internal quotation marks omitted). This Court has repeatedly held that express provision of judicial review for some types of claims does not carry with it a negative inference "suffic[ient] to support an implication of exclusion as to others" from judicial review. *Michigan Acad.*, 476 U.S. at 674 (quoting *Abbott Labs.*, 387 U.S. at 141). Rather, "silence on the subject leaves the jurisdictional grant of [the APA] untouched." *Verizon Md., Inc.* v. *Public Serv. Comm'n of Md.*, 535 U.S. 635, 644 (2002); cf. *Hertz Corp.* v. *Friend*, 130 S. Ct. 1181, 1187 (2010) ("We normally do not read statutory silence as implicitly modifying or limiting Supreme Court jurisdiction that another statute specifically grants."). "The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Abbott Labs.*, 387 U.S. at 141 (internal quotation marks omitted).[3]

At a minimum, it is not clear that Congress intended implicitly to revoke APA review for ACOs. As set forth below, see pp. 34–37, *infra*, an interpretation of the CWA that would prevent property owners from seeking review of ACOs would present grave due process concerns by effectively depriving property owners of review of administrative

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[3] The Ninth Circuit also noted that the Conference Committee that produced the final version of the Clean *Air* Act removed a provision that would have allowed pre-enforcement review of ACOs under that statute. Pet. App. A-8. But this Court has often noted the dangers of relying on Congress's failure to enact a provision. *Cook Cnty.* v. *United States ex rel. Chandler*, 538 U.S. 119, 132 (2003) ("Inferring repeal from legislative silence is hazardous at best * * * ."). Moreover, there is no comparable legislative history for the statute actually under review, the Clean *Water* Act.

restrictions on the use of their property. "When the constitutionality of a statute is challenged, this Court first ascertains whether the statute can be reasonably construed to avoid the constitutional difficulty." *Ellis* v. *Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 444 (1984). Because the CWA is readily interpreted to preserve APA review of ACOs, that reading is to be preferred to the constitutionally suspect reading that would bar such review. This principle gives effect to "the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005). Application of the presumption here is particularly sensible, because Congress presumably *did not* intend to deprive the Sacketts—and similarly situated landowners—of due process by being coerced to comply with ACOs that are effectively unreviewable by any court.

2. The Sacketts' ACO Was "Final Agency Action" Subject To APA Review

"The cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way." *Abbott Labs.*, 387 U.S. at 149. "[T]he nature of the claim being asserted and the consequences of deferment of judicial review are important factors in determining whether a statutory requirement of finality has been satisfied." *Mathews* v. *Eldridge*, 424 U.S. 319, 331 n.11 (1976). This Court has looked to a variety of factors in assessing the finality of an administrative order, including whether (1) it provides "definitive statements of the [agency's] position"; (2) it has "a direct and immediate effect on the day-to-day

business of the complaining parties"; (3) it has "the status of law" and "immediate compliance with their terms was expected"; (4) the suit presents a "legal issue fit for judicial resolution"; and (5) the "challenge [i]s calculated to speed enforcement." *FTC* v. *Standard Oil Co. of California*, 449 U.S. 232, 239 (1980) (internal quotation marks and alterations omitted). Applying these principles points unambiguously to the conclusion that the Sacketts' order was final agency action.

a. In *Bennett* v. *Spear*, 520 U.S. 154 (1997), the Court emphasized that, to be "final," agency "action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Id.* at 177–178. There is little question that the Sacketts' ACO is a "definitive statement[] of [EPA's] position" on their case. There is nothing "tentative" about EPA's factual findings; the order definitively states EPA's conclusion that the Sacketts discharged fill from a point source into wetlands on their property adjoining Priest Lake, a navigable waterway. Pet. App. G-2. There is no indication whatsoever that EPA's investigation into the relevant facts was continuing or would be subject to revision because of ongoing factfinding: It is plainly conclusive. See *CSI Aviation Servs., Inc.* v. *United States Dep't of Transp.*, 637 F.3d 408, 412 (D.C. Cir. 2011) (finding finality where agency "letter declared in no uncertain terms that 'CSI has been acting as an unauthorized indirect air carrier in violation of section 41101'"). Thus, the Sacketts' case "would not 'benefit from further factual development of the issues presented.'" *Whitman* v. *Am. Trucking Ass'ns, Inc.*,

531 U.S. 457, 479 (2001) (quoting *Ohio Forestry Ass'n, Inc.* v. *Sierra Club*, 523 U.S. 726, 733 (1998)).

Nor is there anything "tentative" about the action EPA commands the Sacketts to take. It states in conclusive terms that they are "hereby ORDERED" to undertake a detailed course of action, Pet. App. G-4–G-5, which is set forth in explicitly mandatory terms: The Sacketts "*shall* remove all unauthorized fill material" and "restore[]" the site "to its original, pre-disturbance topographic condition," and the work "must be completed" by a specified date. *Ibid.* (emphasis added). The order provides no grace period; it specifies that it is "effective on the date it is signed." *Id.* at G-6. The order is, by its terms, a complete and self-contained remedial plan for the Sacketts' alleged violation. "Short of an enforcement action, EPA has rendered its last word on the matter." *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 586 (1980). Under such circumstances, there is no risk that judicial review of the order will "'inappropriately interfere with further administrative action,' since EPA has concluded its consideration of the * * * issue." *Whitman*, 531 U.S. at 479 (quoting *Ohio Forestry Ass'n*, 523 U.S. at 733). Thus, the Sacketts' order is "fit for judicial resolution." *Standard Oil*, 449 U.S. at 240 (internal quotation marks omitted).

It is true that the Order "encourages" the Sacketts "to engage in informal discussion of the terms and requirements" of the ACO and states that "[a]lternative methods to attain the objectives of this Order may be proposed." Pet. App. G-5–G-6. But that boilerplate language provides no indication that EPA is still considering any course of action other

than that set forth in the Order.[4] See *Fairbanks N. Star Borough* v. *United States Army Corps of Eng'rs*, 543 F.3d 586, 591–592 (9th Cir. 2008) (finding definitive agency statement where statement "would change only if new information supporting a revision is provided") (internal quotation marks omitted). Indeed, "if the possibility * * * of future revision in fact could make agency action non-final as a matter of law, then it would be hard to imagine when any agency rule * * * would ever be final." *Gen. Elec. Co.* v. *EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002).

b. In considering whether an ACO will have "a direct and immediate effect on the day-to-day business of the complaining parties," *Standard Oil*, 449 U.S. at 239 (internal quotation marks and alteration omitted), it is useful to consider the effect of federal regulators' simple determination that the CWA applies to their "activities or tracts of land." 33 CFR § 320.1(a)(6). An agency's mere "jurisdictional determination" immediately curtails the owner's ability to engage in "'a broad range of ordinary industrial and commercial activities'" (*Rapanos*, 547 U.S. at 721 (plurality opinion) (quoting *Hanousek* v. *United States*, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting from denial of certiorari))—to say nothing of routine farming and ranching activities—because they become subject to oversight and permitting under the CWA. Everyday activities would become subject to an onerous permitting process whose outcome and duration is uncertain, and whose sheer complexity makes the use of

[4] Indeed, EPA rebuffed the Sacketts' efforts to present information suggesting the property was not a jurisdictional wetlands. See Pet. Br. 9.

expensive attorneys and consultants essentially unavoidable. See pp. 29–31, *infra*.

When property is encumbered with an agency's "wetland" determination, the difficulty, expense, delays, and uncertainty of CWA regulation has an immediate and profound effect on property value. See Br. *Amicus Curiae* of Am. Petroleum Inst. *et al.*, at 26–27. One study determined that the presence of wetlands had a "significant negative impact on rural land prices." John E. Reynolds & Alex Regalado, *The Effects of Wetlands and Other Factors on Rural Land Values*, APPRAISAL J., April 2002, at 182. This effect is attributable not to the natural features of the land but to "state and federal 'jurisdiction' over the[] property and interference with * * * private decision making." *Ibid.* Potential purchasers' well-founded concerns about "a myriad of forms and documents, delays, consultant fees, and parcel restrictions—which may add significantly to the cost of land use changes," and which thereby diminish owners' ability to "generate higher returns [from] their lands," *ibid.*—significantly depress its value. *Nat'l Ass'n of Home Builders* v. *Corps of Eng'rs*, 417 F.3d 1272, 1278 (D.C. Cir. 2005) (internal quotation marks omitted); *id.* at 1279–1280 (change to nationwide permits constituted final action where change would "directly affect * * * investment and project development choices"); *Minard Run Oil Co.* v. *United States Forest Serv.*, No. 09-125, 2009 WL 4937785 (W.D. Pa. Dec. 15, 2009) (holding that drilling ban

was final where ban caused economic hardships to numerous energy companies).[5]

c. An administrative compliance order has still further onerous effects. As noted above, the Order purports to impose an immediate requirement to "remove all unauthorized fill material" by a required date and to return the property to the original condition "[t]o the maximum extent practicable," Pet. App. G-4, warning that the order is "effective on the date it is signed" (*i.e.*, immediately), *id.* at G-6. Moreover, "failure to comply with[] the foregoing Order may subject [the Sacketts] to (1) civil penalties of up to $32,500 per day of violation * * * [and] (2) administrative penalties of up to $11,000 per day * * *." *Id.* at G-7. And the order states that the owner must "provide any successor in * * * interest" to the land "with a copy of this Order at least 30 days prior to the transfer of" an interest in the property. *Id.* at G-6.

The undeniable purpose of the Order is to coerce immediate compliance with the agency's remedial directive using the threat of massive civil and administrative penalties. This Court has unequivocally held that "EPA[] orders [that] effectively halt[]"

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[5] Other administrative decisions having similarly immediate and drastic impacts have been subject to immediate judicial review under a variety of regimes. *E.g.*, *Stevenson* v. *Blaine Cnty.*, 9 P.3d 1222, 1223–1226 (Idaho 2000) (holding that preliminary plat approval was final where it authorized project that would allegedly harm neighbor by creating noise and increasing traffic); *A.A. Profiles, Inc.* v. *City of Ft. Lauderdale*, 850 F.2d 1483, 1485–1487 (11th Cir. 1988) (holding that city's rezoning "constituted a final, definitive position," where rezoning caused business to be "unable to meet expenses" and caused lenders to "foreclose[] on [the] property").

activities because the owner "would risk civil and criminal penalties if it defied a valid EPA directive" are final and subject to review. *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 483; see also *Barrick Goldstrike Mines, Inc.* v. *Browner*, 215 F.3d 45, 47–48 (D.C. Cir. 2000) (finding agency action final, in part because of risk of enforcement action and fines that could result if party refused to follow agency position); *CSI Aviation Servs.*, 637 F.3d at 412 (agency cease-and-desist order had direct and immediate impact on regulated party).

In serving ACOs, agencies frequently use language that is plainly calculated to create alarm and intimidate landowners into immediate compliance with agency demands by threatening ruinous fines. One Iowa farmer, who had obtained state and county approvals to do work on an area adjacent to a river to level a pasture, received the following warning with EPA's ACO in February of this year:

> **Please read the Order carefully. It contains a number of specific requirements and deadlines, and compliance with the Order is mandatory.**
>
> EPA also believes that an enforcement action in the form of a civil penalty is appropriate for the aforementioned violations. However, before we initiate an action t0 seek penalties, EPA would like to review the restoration or mitigation work plan required under * * * the Order. Please note that, as long as the fill material remains [in place], your actions constitute a continuing violation of the CWA. The timeliness and quality of your work plan submission impacts the duration

> of the violation and, therefore, will be factored in EPA's determination of a penalty.
>
> We ask that you please contact us within seven days of receipt of this letter. * * * If we do not hear from you within seven days, we will assume you are not interested in discussing this matter and may proceed to file an Administrative Complaint initiating a penalty action.[6]

Farmers and ranchers are particularly vulnerable to such pressures. They are frequently persons of modest means who lack the financial resources to risk the imposition of substantial fines from being in "continuing violation" of a purportedly "mandatory" agency order, and cannot afford to have the legal status of their property under a cloud for a prolonged period. Their land is typically their principal asset, and frequently provides collateral for loans and capital purchases needed to operate their farm or ranch. The agency's assertion that their property is subject to expensive remediation and that they face significant fines diminishes the value of their collateral and may affect their ability to obtain loans. Accordingly, farmers and ranchers frequently are forced by circumstances to accept whatever demands the agency makes.

The practical experience of farmers and ranchers demonstrates that ACOs often have their intended purpose of coercing prompt action. For example:

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[6] Letter from Karen A. Flournoy, Acting Director, Water, Wetlands and Pesticides Division, EPA Region 7, to David Ward, Feb. 8, 2011, at 1-2 (emphasis in original).

- Although one Mississippi farmer received a permit from state regulators to build a pond on his property, the Corps of Engineers determined that the addition violated the CWA. Rather than "come up with $450,000 for another permit or 30 to 40 acres of a certain kind of land I didn't have," the landowner returned the property to its previous condition at his own expense. See Ray Van Dusen, *Man's lake makes waves*, Clarion-Ledger, Sept. 20, 2009, at 2B.

- A third-generation Massachusetts farmer was found in violation of the CWA for digging drainage ditches, among other "violations." He complied with the ACO's requirement that he restore the land to its previous condition, commenting that he wished to "turn the farm over to his daughters without violations hanging over it." Bob Dunn, *Pasiecnik says he'll comply with EPA order*, The Recorder, Oct. 14, 2010, *available at* http://www.buylocalfood.com/page.php?id=425&pagetype=page.

- A husband and wife who operate a dairy farm in Vermont paid over $100,000 in restoration, compensatory mitigation, and supplemental environmental projects demanded by EPA after they were cited for a violation for "expanding forage acres to support their dairy herd." *Filling Wetlands Costly for Vermont Dairy Farmers*, *supra*.

- A rancher in California was required to convey a 300-acre parcel for conservation to settle

> claims that he plowed "33 acres of vernal pools and swales" on his land to prepare it for planting.[7]

Whether farmers and ranchers must spend often hundreds of thousands of dollars to mitigate EPA-claimed "violations," or lose their ability to operate, it is undeniable that ACOs have "a direct and immediate effect on the day-to-day business" of American farmers and ranchers. *Standard Oil*, 449 U.S. at 239 (internal quotation marks and alteration omitted).

C. CWA Permitting Is So Costly And Slow As To Foreclose Access To The Courts

The Ninth Circuit concluded that "statutory preclusion of pre-enforcement judicial review of administrative orders violates due process only when the 'practical effect of coercive penalties for noncompliance is to foreclose all access to the courts' so that 'compliance is sufficiently onerous and coercive penalties sufficiently potent that a constitutionally intolerable choice might be presented.'" Pet. App. A-13 (quoting *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 218 (1994) (alteration omitted)). The court's judgment that foreclosure of APA review complied with due process relied on its assumption that landowners could obtain prompt review of an ACO by seeking a CWA permit and "immediately appeal[ing]" a denial. *Ibid.* Putting aside the absurdity of requiring landowners to seek a CWA

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[7] See *EPA settles wetlands enforcement case in Tulare County* (Sept. 22, 2004), *available at* http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/37159a7a88718df5852570d8005e169a!OpenDocument.

permit simply so they can obtain a judicial determination that they did not need one, seeking a CWA permit can be just as expensive as the potential penalties for violating an ACO. It can also leave landowners in a state of uncertainty during the one to two *years* applications typically are pending. The delays and costs of CWA permitting mean that thousands of American landowners "would not as a practical matter be able to obtain meaningful judicial review" of administrative compliance orders before circumstances force them to comply. *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991).

The wetland permitting process, set forth in Section 404 of the CWA, 33 U.S.C. § 1344, is primarily administered by the Army Corps of Engineers.[8] The Corps issues two types of Section 404 permits: individual permits and general (nationwide) permits.[9]

1. Individual permits. Individual permits are issued based on the Corps' case-by-case consideration of a project, 33 CFR § 323.2(g), in light of the agency's assessment of "the needs and welfare of the

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[8] States can assume jurisdiction over Section 404 permitting for "nonnavigable" waters, but only two—New Jersey and Michigan—have done so. See EPA, State or Tribal Assumption of the Section 404 Permit Program, *available at* http://www.epa.gov/owow/wetlands/facts/fact23.html; 40 CFR § 233.70–.71; N.J. Stat. Ann. 13:9B-1; Mich. Comp. Laws Ann. § 324.30304b.

[9] 33 U.S.C. § 1344(a), (e); 33 CFR § 323.2(g), (h); *id.* § 330.1(a); U.S. Army Corps of Engineers, South Atlantic Division, Regulatory Program, *available at* http://www.sad.usace.army.mil/regulatory/RegulatoryPermit.htm.

people." *Id.* § 320.4(a). The formal process begins when the landowner files an application.[10] Then the Corps issues public notice and receives comments. *Corps Regulatory Jurisdiction* at 4.

a. The Corps' standardized permit application form, ENG Form 4345, serves as the basic form for all individual permit applicants.[11] It requires the applicant to submit "[t]hree types of illustrations * * * depict[ing] the work to be undertaken," including "a Vicinity Map, a Plan View [and] a Typical Cross-Section Map," as well as a detailed description of the development, including "dimensions of structures such as wing walls, dikes (identify the materials to be used in construction, as well as the methods by which the work is to be done), or excavations (length, width, and height)," as well as the type and amount of "material to be discharged within Corps jurisdiction." Form 4345 Instructions.

But completing Form 4345 is just the first step. As one Corps office has acknowledged, "[b]ased on

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[10] For bigger projects, "[p]re-application consultation" may be warranted, involving one or several meetings between an applicant, Corps district staff, interested Federal, state, or local resource agencies, and "sometimes the interested public." U.S. Army Corps of Engineers, Headquarters, *Regulatory Jurisdiction Overview*, at 3-4, *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/reg_juris_ov.pdf ("*Corps Regulatory Jurisdiction*").

[11] 33 CFR § 325.1(c); *Application for Department of the Army Permit*, *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/eng4345a.pdf ("Form 4345"); see also *Instructions for Preparing a Department of the Army Permit Application*, *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/eng4345_instructions_2009.pdf ("Form 4345 Instructions").

our experience, the environmental information necessary to make the public interest determination is often inadequate when only the ENG Form 4345 form is submitted."[12] Thus, project managers frequently "must then request additional information from applicants, resulting in delays in project evaluation." *Hawaii Questionnaire* 1. See generally 33 CFR § 325.1(e) (stating that applicant may be required to furnish additional information). Although Corps regulations state that "[d]istrict and division engineers are not authorized to develop additional information forms but may request specific information on a case-by-case basis," see 33 CFR § 325.1(d)(1), some Corps offices routinely require applicants to submit multi-page supplemental questionnaires, forms, or checklists along with Form 4345.[13] Still other Corps offices have replaced Form 4345 with completely different forms, some of which are much more extensive than Form 4345, and which typically request data to ensure

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[12] U.S. Army Corps of Engineers, Honolulu District, Regulatory Branch, *Permit Application Questionnaire*, *available at* http://www.poh.usace.army.mil/EC-R/forms/ecr-Questionnaire.doc ("*Hawaii Questionnaire*").

[13] See *Hawaii Questionnaire*; U.S. Army Corps of Engineers, New York District, Regulatory Branch, *available at* http://www.nan.usace.army.mil/business/buslinks/regulat/formdocs/new-201r.pdf ("*NY Questionnaire*"); U.S. Army Corps of Engineers, Alaska District, Permit Application & Instructions, *Applicant Proposed Mitigation Statement*, *available at* http://www.poa.usace.army.mil/reg/PermitApp.htm ("*Alaska Mitigation Statement*"). Corps regulations appear to prohibit local offices from using such supplemental forms.

compliance with state, as well as federal, environmental laws.[14]

These forms provide a sense of the dizzying array of detailed information regulators demand of landowners during the CWA process, including, for example, information about the "kind of substrate" found at the site, salinity levels, "the range of water levels which occur," "water currents and water circulation patterns," "the quality of the air," the "history or possibility of contaminants/pollutants" in the soil used for the fill material, and even existing and anticipated future noise levels at the site. *Hawaii Questionnaire* 2-3. Applicants are told to submit "[b]iological survey reports from a qualified environmental professional," *Hawaii Questionnaire* 3, and "photographs of the waterway vicinity * * * taken at low tide," together with an annotated "copy of your plan view, indicat[ing] the location and direction of each photograph as well as the date and time at which the photograph was taken." *NY Questionnaire* 1; see also *Oregon Joint Application* 3

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[14] See, *e.g.*, Oregon.gov, Wetlands/RF Forms & Publications, *Joint Application*, *available at* http://www.oregon.gov/DSL/PERMITS/forms.html ("*Oregon Joint Application*"); U.S. Army Corps of Engineers, Nashville District, Regulatory Branch, *Joint Application Form, Department of the Army/TVA*, *available at* http://www.lrn.usace.army.mil/cof/pdf/CorpsTVAform.pdf ("*TVA Joint Application*"); U.S. Army Corps of Engineers, New York District, Regulatory Branch, *available at* http://www.nan.usace.army.mil/business/buslinks/regulat/formdocs/JtAp0910.pdf ("*NY Joint Application*"); *Joint Federal and State Application Form for Activities Affecting Waters of the United States or Critical Areas of the State of South Carolina*, *available at* http://www.sac.usace.army.mil/assets/pdf/regulatory/permits/joint_permit_application_form-Fillable%20(3).pdf ("*SC Joint Application*").

(asking for "Recent Aerial photo (1:200, or if not available for your site, the highest resolution available)"). One form asks the applicant to

> [d]escribe the existing physical and biological characteristics of the wetland/waterway site by area and type of resource (Use separate sheets and photos, if necessary). For wetlands, include, as applicable: Cowardin and Hydrogeomorphic (HGM) wetland class(s)[;] [d]ominant plant species by layer (herb, shrub, tree)[;] * * * [a]ssessment of the functional attributes of the wetland to be impacted[.] Identify any vernal pools, bogs, fens, mature forested wetland, seasonal mudflats, or native wet prairies in or near the project area."

Oregon Joint Application 5.

Agencies also routinely require applicants to "[p]rovide a complete narrative description of the proposed work and its purpose[,] * * * [i]nclud[ing]: description of current site conditions and how the site will be modified by the proposed project; * * * type and quantity of materials to be used (i.e., square ft of coverage and cubic yds of fill material and/or structures below ordinary/mean high water); area of excavation or dredging, volumes of material to be removed and location of dredged material disposal or use; work methods and type of equipment to be used." *NY Joint Application* 2. They must specify the "[l]ocation of staging areas[;] [l]ocation of construction access[;] [l]ocation of cross section(s), as applicable[;] [and l]ocation of mitigation area, if applicable," *Oregon Joint Application* 3. Applicants are frequently asked to include "a thorough

discussion of alternatives to your proposal," *NY Questionnaire* 2, and steps taken to "avoid[] impacts to * * * wetlands[] to the maximum extent practicable," and elements of the project design that "minimize the unavoidable impacts" on wetlands. *Alaska Mitigation Statement* 1-2. And, of course, applicants are routinely required to provide proposed "compensatory mitigation" measures—that is, what steps they will take to restore or enhance wetlands elsewhere to offset their construction efforts, or the payment of (frequently substantial) fees in lieu of such restoration. *E.g.*, *id.* at 2.

b. As is apparent from the types of information these forms require, landowners are often unable to complete these forms on their own. Although the instructions for the basic Form 4345 form opine that "[a]n agent is not required" to complete the CWA permitting process, *Form 4345 Instructions* 1, the reality is that landowners typically engage "an attorney, builder, contractor, [or] engineer," to serve as their agent, *ibid.*, and it is usually necessary to retain attorneys and consultants to furnish required information, to implement agency requirements, and simply to navigate the complex permitting process. *E.g.*, Chilton Testimony at 4 (noting necessity of "hiring attorneys and environmental consultants"). Indeed, agencies sometimes request—or demand—that landowners engage "an experienced professional" or "environmental consultant."[15] The

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[15] See, *e.g.*, *Hawaii Questionnaire* 3 (recommending "[b]iological survey reports from a qualified environmental professional"); Letter from Nicholas Baggett, Project Manager, Inland Branch, Regulatory Division, Corps of Engineers, Mobile District, to David Evans, Sept. 20, 2007 (directing landowner to "[p]rovide a description and survey of the jurisdictional area

heavy involvement of consultants is unsurprising given the complexity of the regulatory structure, and, indeed, the complexity of the agency's *guidance documents*: A recent draft of the Guidelines for Preparing a Compensatory Mitigation Plan, with appendices, weighs in at 114 pages.[16]

Applying for an individual permit is therefore an expensive and time-consuming task. According to one study, the mean cost for preparing an individual permit application was $271,596, not including costs of mitigation, changes to designs, and carrying capital. David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RES. J. 59, 74 (2002). It takes an *average* of 788 days to obtain an individual permit. *Id.* at 75-76. Permits for even the simplest activities related to agriculture commonly cost tens of thousands of dollars and impose significant delays. See, *e.g.*, Chilton Testimony at 4

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impacted by the activity. This survey should be conducted by an experienced professional * * *."); Letter from Cindy J. House-Pearson, Office Manager, Birmingham Field Office, Regulatory Division, Corps of Engineers, Mobile District, to David Evans, Feb. 2, 2007 (state "[a]mount of jurisdictional waters/wetlands impacted onsite. Please be aware that making this determination may require the services of an environmental consultant."). See Corps of Engineers, Charleston District, Regulatory Division, *Courtesy List of South Carolina Environmental Consultants*, Aug. 2011, *available at* http://www.sac.usace.army.mil/assets/pdf/regulatory/consultants.pdf.

[16] See Corps of Engineers, Charleston District, *Guidelines for Preparing a Compensatory Mitigation Plan*, Oct. 7, 2010, *available at* http://www.mvk.usace.army.mil/offices/od/odf/Charleston%20Method%202010%20Guidelines.pdf.

(stating that approval to build bridge across dry wash on ranch took one year and $40,000). The already-lengthy process is further delayed by an estimated backlog of 15,000-20,000 CWA permit requests nationally. *Ibid.* It is the experience of *amici* that the Corps is particularly slow in approving permits for certain types of agricultural activities, particularly "deep plowing," used to convert land used for row crops or grazing to fruit or nut production. Some California deep-plowing permit applications have been pending literally for years.

2. Nationwide permits. The second type of permit issued by the Corps of Engineers is the nationwide permit ("NWP").[17] The Corps issues such permits to authorize categories of activities on a nationwide basis. There are currently fifty NWPs in force.[18] One such permit—NWP 40—is specifically intended for agricultural activities, although its utility is quite limited: It permits not more than a one-half acre loss of wetlands or the relocation of 300 linear feet of drainage ditches, and is subject to a general requirement of compensatory mitigation. See U.S. Army Corps of Engineers, Sacramento District, *Nationwide Permit Summary, NWP 40, Agricultural Activities*, at 1, *available at* http://www.spk.usace.army.mil/organizations/cespk-

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[17] 33 U.S.C. § 1344(a), (e); 33 CFR § 323.2 (h); *id.* § 330.1(a).

[18] See U.S. Army Corps of Engineers, Headquarters, Nationwide Permits Information, *2007 Nationwide Permits, Conditions, Further Information and Definitions (with corrections), available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/nwp/nwp2007_gen_conditions_def.pdf ("*2007 Nationwide Permits Conditions*").

co/regulatory/nwp/nwp-40.pdf ("*Sacramento Permit Summary*").

Once the landowner decides that his activity may be authorized under one or more of the Corps' NWPs, the landowner must determine whether those permits require that the landowner give "pre-construction notification" to the Corps. 33 CFR § 330.1(e). Twenty-nine of the 50 NWPs—including NWP 40—require such notification.[19] Each NWP is subject to 28 general conditions, see, *e.g.*, *Sacramento Permit Summary* 1-7, and a host of variable regional and local conditions. *Id.* at 7-12. To ensure that the applicant complies with that byzantine patchwork of regulation, regional Corps offices have promulgated myriad forms that landowners must use to give formal notification. These forms frequently exceed 20 pages.[20] Although labeled notification forms, they function like a permit application: The landowner may not begin construction until a Corps official notifies the landowner that the activity may proceed with any new conditions that the Corps may impose. See, *e.g.*, *Sacramento Permit Summary*, at 5.

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[19] See *2007 Nationwide Permits Conditions* 4-24.

[20] See, *e.g.*, U.S. Army Corps of Engineers, Fort Worth District, Application Submittal Forms, available at http://www.swf.usace.army.mil/pubdata/environ/regulatory/permitting/applicationforms/index.asp (application forms for NWPs 3, 12–14, 21, 29, 39, and 43); U.S. Army Corps of Engineers, Sacramento District, Regulatory Program, *Nationwide Permit Pre-Construction Notification (PCN) Form*, *available at* http://www.spk.usace.army.mil/organizations/cespk-co/regulatory/nwp/SPK_PCN_noCO.doc ("*Sacramento PCN Form*"); U.S. Army Corps of Engineers, Wilmington District, Regulatory Program, *Pre-Construction Notification (PCN) Form*, *available at* http://www.saw.usace.army.mil/Wetlands/pcn/form/PCNv1_4.pdf.

The pre-construction notification forms require applicants to supply a variety of information, including, for example:

- "For proposed discharges of dredged material into waters of the U.S. (including beach nourishment), please attach a proposed Sampling and Analysis Plan (SAP) prepared according to Inland Testing Manual (ITM) guidelines (including Tier I information, if available)." *Sacramento PCN Form* at 4.

- "Does the project have the potential to cause effects to any historic properties listed, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, *including previously unidentified properties*?" U.S. Army Corps of Engineers, Fort Worth District, *Application Submittal form for NWP 13*, at 5 (emphasis added), *available at* http://www.swf.usace.army.mil/pubdata/environ/regulatory/permitting/applicationforms/USACE_NWP_13_Application_Form_Final_Protected.doc.

- "A detailed alternatives analysis pursuant to the Section 404(b)(1) Guidelines of the Clean Water Act. This analysis must demonstrate that all other available stormwater and sediment/erosion treatment controls will be implemented and that in-stream detention/retention is the only available practicable alternative that would meet the basic project purpose. This analysis should also include all project site specific factors that may render other stormwater detention/retention measures

> impractical, such as: steep slopes; rock substrate; narrow floodplain; and pre-existing development." U.S. Army Corps of Engineers, *Savannah District 2007 Nationwide Permit Regional Conditions* 2-3, *available at* www.fws.gov/athens/stream_crossing/RegionalConditions2007.pdf.

Although nationwide permits are designed to simplify the permit application process, obtaining approval to use them is still costly and time-consuming. One study found that the mean time needed to obtain approval to use a nationwide permit was 313 days—nearly a year. Sunding & Zilberman, 42 NAT. RES. J. at 75-76. Moreover, the process sometimes costs over $100,000; obtaining approval even in a typical case can cost nearly $30,000. *Id.* at 74 & n.67.

D. Requiring Landowners To Seek CWA Permits To Obtain Review Of Administrative Compliance Orders Subjects Them To A Constitutionally Intolerable Choice

1. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Eldridge*, 424 U.S. at 333 (quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)). Time and again, this Court has recognized that this bedrock requirement is not satisfied where limitations on access to courts deprive parties of "meaningful judicial review" "as a practical matter." *McNary*, 498 U.S. at 496; accord *Eldridge*, 424 U.S. at 331 n.11.

Judicial review is necessary to avoid putting landowners of modest means to a "constitutionally intolerable choice" (*Thunder Basin*, 510 U.S. at 218) between (1) immediately removing improvements and undertaking expensive remediation to restore their property to its previous condition, frequently at a cost of tens of thousands of dollars or more; (2) not abiding by the order and risking devastating fines that, as agencies frequently remind landowners, can accrue at the rate of "$32,500 per day for each violation," Pet. App. F-2, while their ability to borrow correspondingly declines; or (3) devoting one to two years and an average of between $30,000 and nearly $300,000 pursuing a CWA permit, all for the chance to obtain the judicial review they need to prove that it is unnecessary. Under such circumstances, it is no wonder that so many landowners simply give in to regulators and remove improvements they believe to be lawful, because it is the only route that ends their uncertainty within a reasonable period and permits them to set a reasonable upper limit on their costs. It is difficult not to conclude that "the practical effect" of this situation is "foreclose all access to the courts" for thousands of law-abiding landowners. *Thunder Basin*, 510 U.S. at 218.

Thunder Basin is not to the contrary. There, this Court held that the absence of pre-enforcement judicial review of an agency decision under the Federal Mine Safety and Health Amendments Act did not deprive a mine operator of due process. But the Court emphasized that compliance with the order in that case (which required the operator merely to post the names of miners' representatives) would not "subject [the mine operator] to serious

harm." 510 U.S. at 216-217. Moreover, the mine operator had protections that property owners can only dream about, including an expedited administrative process followed by immediate judicial review, *id.* 218, as well as the prospect of "temporary relief of certain orders" while the matter was pending before the agency and the court. *Ibid.* While this Court readily concluded that compliance with the agency order was not "sufficiently onerous and coercive penalties sufficiently potent" to be "constitutionally intolerable," *ibid.*, that situation was a far cry from what landowners face when they are subject to agency demands that they immediately remove improvements on pain of enormous civil and administrative penalties.

2. Review of ACOs both eliminates that "constitutionally intolerable" situation and also better accords with the demands of due process. See generally *Eldridge*, 424 U.S. at 335. Review of ACOs would fully protect the government's legitimate interests by "'allow[ing] EPA to act to address environmental problems quickly.'" Pet. App. A-8 (quoting *S. Pines Assocs.*, 912 F.2d at 716). As noted above, see pp. 11–13, *supra*, the government cannot credibly claim that allowing review would interfere with agency decisionmaking. Regulators would lose only the power to browbeat landowners outside the view of federal courts.

But allowing review of such orders would provide an immediate benefit to landowners and significantly reduce "the risk of an erroneous deprivation." *Eldridge*, 424 U.S. at 335. Judicial review of ACOs would provide landowners an opportunity to seek review of an agency's determination that the

property contained "wetlands" and that the landowner's actions were in violation of the CWA. Judicial review would act as a check on the agencies' inordinately broad reading of their regulatory jurisdiction, and improve the reliability of the agencies' ad hoc decisionmaking process, which on occasion "has been little short of capricious." *In re Carsten*, 211 B.R. 719, 725–726 (Bankr. D. Mont. 1997) (describing a "litany of government conceit" although rancher had acted "in complete good faith" and "obeyed all the government's orders—no matter how overbearing or contradictory such orders may have been"). The process would provide a significant benefit to both regulated landowners and regulators themselves, by helping to develop a body of law that could provide a framework for more predictable agency decisionmaking. That is something that has been in short supply for far too long.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 2011

AMICUS CURIAE BRIEF

No. 10-1062

RECORDS AND BRIEFS

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
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CHANTELL SACKETT AND
MICHAEL SACKETT,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION, BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL, CROPLIFE AMERICA, THE FERTILIZER INSTITUTE, FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL MINING ASSOCIATION, NATIONAL MULTI HOUSING COUNCIL, AND UTILITY WATER ACT GROUP AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. May Petitioners seek pre-enforcement judicial review of the Administrative Compliance Order pursuant to the Administrative Procedure Act, 5 U.S.C. § 704?

2. If not, does Petitioners' inability to seek pre-enforcement judicial review of the Administrative Compliance Order violate their rights under the Due Process Clause?

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES v
INTEREST OF *AMICI CURIAE* 1
SUMMARY OF ARGUMENT 3
BACKGROUND 4
I. Administrative Theories of Jurisdiction Under the Clean Water Act 6
A. The "Anywhere a Bird Can Land" Theory 6
B. The "Any Connection" Theory 9
C. Jurisdictional Theories Post-*Rapanos* 12
II. Lack of Judicial Oversight 16
ARGUMENT 17
I. A Jurisdictional Determination Issued Through an Administrative Compliance Order or an Approved Jurisdictional Determination Is Judicially Reviewable. 18
A. Administrative Compliance Orders and Approved Jurisdictional Determinations Consummate Agency Action. 19
B. Administrative Compliance Orders and Approved Jurisdictional Determinations Have the Requisite Effects. 21
II. The Clean Water Act Does Not Preclude Judicial Review. 28
CONCLUSION 34

TABLE OF AUTHORITIES

Page

CASES

Abbott Labs. v. Gardner, 387 U.S. 136 (1967) 18, 28

Alaska Dep't of Envtl. Conservation v. U.S. EPA, 244 F.3d 748 (9th Cir. 2001), *aff'd* 540 U.S. 461 (2004) 22

Bennett v. Spear, 520 U.S. 154 (1997) 19, 21, 28

Bergen Cnty. Assocs. v. Borough of E. Rutherford, 12 N.J. Tax 399 (N.J. Tax Ct. 1992) 27

Dep't of Housing & Urban Dev. v. Rucker, 535 U.S. 125 (2002) 23

Diebold v. United States, 947 F.2d 787 (6th Cir. 1991) 31

Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs, 543 F.3d 586 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2825 (2009) 16, 20, 27

Franklin v. Massachusetts, 505 U.S. 788 (1992) 19

FTC v. Standard Oil Co. of Cal., 449 U.S. 232 (1980) 19, 20

Golden Gate Audubon Soc'y, Inc. v. U.S. Army Corps of Eng'rs, 717 F. Supp. 1417 (N.D. Cal. 1988) 17

Hoffman Group, Inc. v. EPA, 902 F.2d 567 (7th Cir. 1990) 16

TABLE OF AUTHORITIES—Continued

Page

Laguna Gatuna, Inc. v. Browner, 58 F.3d 564 (10th Cir. 1995) 16

Leedom v. Kyne, 358 U.S. 184 (1958) 28

Leslie Salt Co. v. United States, 789 F. Supp. 1030 (N.D. Cal. 1991) 23

Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 417 F.3d 1272 (D.C. Cir. 2005) 19, 22

Nat'l Wildlife Fed'n v. Hanson, 623 F. Supp. 1539 (E.D.N.C. 1985) 17

Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440 (1989) 31

Rapanos v. United States & Carabell v. United States, 547 U.S. 715 (2006) ..... *passim*

Riverside Irrigation Dist. v. Stipo, 658 F.2d 762 (10th Cir. 1981) 24

S. Pines Assocs. v. United States, 912 F.2d 713 (4th Cir. 1990) 16

Sackett v. U.S. EPA, 622 F.3d 1139 (9th Cir. 2010) 23, 29, 30

Sharkey v. Quarantillo, 541 F.3d 75 (2d Cir. 2008) 21

Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) 9, 12

Tabb Lakes, Ltd. v. United States, No. 89-2905, 1989 WL 106990 (4th Cir. Sept. 19, 1989) 8

Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) 32

TABLE OF AUTHORITIES—Continued

Page

United States v. Ellen, 961 F.2d 462 (4th Cir. 1992) 23

United States v. Key West Towers, Inc., 720 F. Supp. 963 (S.D. Fla. 1989) 24

United States v. Marion L. Kincaid Trust, 463 F. Supp. 2d 680 (E.D. Mich. 2006) 32

United States v. Pozsgai, 999 F.2d 719 (3d Cir. 1993) 23

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 6

STATUTES

5 U.S.C. § 701(a) 19

5 U.S.C. § 704 19

33 U.S.C. § 1251 4

33 U.S.C. § 1319(a)(3) ..... *passim*

33 U.S.C. § 1319(c)(1) 23

33 U.S.C. § 1319(c)(2) 23

33 U.S.C. § 1319(d) 23, 24

33 U.S.C. § 1344 4

33 U.S.C. § 1362(7) 4

42 U.S.C. § 9613(h) 29

REGULATIONS

17 C.F.R. § 229.103 27

33 C.F.R. § 320.1(a)(6) 16, 20, 22

33 C.F.R. pt. 328 4

33 C.F.R. § 328.3(a)(3) 4

TABLE OF AUTHORITIES—Continued

Page

33 C.F.R. § 331.2 ..... 16, 20

40 C.F.R. pt. 230 4

40 C.F.R. § 230.3(s)(3) 4

40 C.F.R. § 230.10(a)(1) 25

40 C.F.R. § 230.10(d) 26

40 C.F.R. §§ 230.70-77 26

40 C.F.R. § 230.91(c)(3) 26

FEDERAL REGISTER

40 Fed. Reg. 31,320 (July 25, 1975) 10

42 Fed. Reg. 37,122 (July 19, 1977) 4, 5, 10

45 Fed. Reg. 33,290 (May 19, 1980) 5

45 Fed. Reg. 85,336 (Dec. 24, 1980) 4

51 Fed. Reg. 41,206 (Nov. 13, 1986) 7

RULES

U.S. Sup. Ct. R. 32 1

U.S. Sup. Ct. R. 37.6 1

MISCELLANEOUS

Appendix to Brief of The Serrano Water District, *et al.* as *Amici Curiae* in Support of Petitioner, *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (No. 99-1178) 12

Appendix to Petition for *Writ of Certiorari*, *Sackett v. U.S. Envtl. Protection Agency*, No. 10-1062 (U.S. Feb. 25, 2011) 19, 23

TABLE OF AUTHORITIES—Continued

Page

Brief of American Petroleum Institute, *et al.* as *Amici Curiae* in Support of Petitioners, ***PPL Montana, LLC v. Montana***, No. 10-218 (U.S. Sept. 7, 2011) 14

EPA, *Decision of the General Counsel on Matters of Law Pursuant to 40 C.F.R. § 125.36(m)* (Sept. 18, 1975) 5

Letter from James Gibson, Gibson & Skordal, to Justin Cutler, Project Manager, Delta Office, U.S. Army Corps of Eng'rs, Sacramento Dist. (Aug. 17, 2000) 11

Letter from Justin Cutler, Project Manager, Delta Office, U.S. Army Corps of Eng'rs, Sacramento Dist., to James Gibson, Gibson & Skordal (Aug. 24, 2000) 10, 11

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TABLE OF AUTHORITIES—Continued

Page

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S. DOC. NO. 248, 79th Cong., 2d Sess. (1946) 31

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TABLE OF AUTHORITIES—Continued

Page

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U.S. EPA & U.S. Army Corps of Eng'rs, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (June 5, 2007), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm 14

U.S. EPA & U.S. Army Corps of Eng'rs, "Draft Guidance on Identifying Waters Protected by the Clean Water Act" (May 2, 2011), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm.....13, 14, 15

U.S. GEN. ACCOUNTING OFFICE, GAO-04-297, WATERS AND WETLANDS: CORPS OF ENGINEERS NEEDS TO EVALUATE ITS DISTRICT OFFICE PRACTICES IN DETERMINING JURISDICTION (Feb. 2004), *available at* http://www.gpoaccess.gov/gaoreports 11

TABLE OF AUTHORITIES—Continued

Page

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INTEREST OF *AMICI CURIAE*

This case concerns whether judicial review is available when the government asserts that it has jurisdiction to act under the Clean Water Act ("CWA"). *Amici* represent a broad cross-section of industry interests, including mining and energy, road builders, landowners, fertilizer companies, and commercial and residential real estate interests. *Amici* are frequently subject to jurisdictional determinations issued by the U.S. Army Corps of Engineers ("Corps") and the U.S. Environmental Protection Agency ("EPA") under the CWA, and, as such, *amici* have a vital interest in this and other cases addressing the CWA.[1]

The American Petroleum Institute represents over 480 members engaged in exploration, production, refining, marketing, transportation, and distribution of petroleum products.

The American Road & Transportation Builders Association's membership includes public agencies and private firms and organizations that own, plan, design, supply, and construct transportation projects throughout the country.

---

[1] Pursuant to Rule 37.6 of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief. The letters of consent have been filed with the Clerk of Court. In addition, counsel for *amici* has filed a letter with the Court requesting to lodge materials cited in this brief that are not readily available from public sources pursuant to Rule 32.

The Building Owners and Managers Association International's members are building owners, managers, developers, leasing professionals, medical office building managers, corporate facility managers, asset managers, and the providers of the products and services needed to develop and operate commercial properties.

CropLife America's member companies produce, sell, and distribute virtually all the crop protection and biotechnology products used by American agricultural producers.

The Fertilizer Institute represents the fertilizer industry's producers, manufacturers, retailers, trading firms, and equipment manufacturers.

The Foundation for Environmental and Economic Progress is a national coalition of large landholding companies that own significant amounts of land in 44 states.

The International Council of Shopping Centers has over 47,000 members in the United States alone and represents the interests of shopping center owners, developers, managers, investors, lenders, retailers, and other professionals in the retail real estate industry.

The National Association of Real Estate Investment Trusts represents real estate investment trusts and other real estate businesses that own, operate, and finance commercial and residential real estate.

The National Association of REALTORS® represents persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling.

The National Mining Association's members produce most of America's coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries.

The National Multi Housing Council ("NMHC") represents the interests of the larger and most prominent apartment firms in the United States. NMHC's members are engaged in all aspects of the apartment industry, including ownership, development, management, and financing.

The Utility Water Act Group ("UWAG") is a voluntary, ad hoc group of 171 energy company systems that own and operate over fifty percent of the nation's total electric generating capacity. The individual energy companies operate power plants and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers. UWAG members also include the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association.

For the reasons given below, *amici* respectfully urge the Court to hold that regulated parties have a right to immediately challenge the agencies' imposition of jurisdiction under the CWA.

SUMMARY OF ARGUMENT

At the heart of this case is the threshold question of whether the agencies have authority under the CWA to impose regulatory control over Petitioners' land. But Petitioners here are just two of many thousands of regulated parties that annually are

subjected to the agencies' imposition of CWA jurisdiction through a variety of regulatory tools. Although the agencies have taken extremely broad positions regarding their jurisdiction under the CWA—positions that have been repeatedly rejected by this Court—most regulated parties have been effectively prohibited from challenging the agencies' jurisdictional determinations in court. This lack of judicial oversight has enabled jurisdictional creep under the CWA, despite this Court's prior admonitions. As a matter of sound statutory interpretation, sensible CWA policy, and fundamental fairness to regulated parties, this Court should hold that a jurisdictional determination under the CWA, including in the context of an administrative compliance order ("ACO"), is judicially reviewable.

BACKGROUND

When Congress adopted the CWA in 1972, it authorized the agencies to regulate the discharge of pollutants into "navigable waters," which the statute defines to mean "the waters of the United States, including the territorial seas." 33 U.S.C. §§ 1251, 1344, 1362(7). In 1977, the Corps adopted regulations to define "the waters of the United States," EPA adopted similar regulations in 1980, and the definition remains essentially unchanged today.[2] Even under this broad regulatory definition, which the Corps described as incorporating *all* waters that

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[2] *See* 42 Fed. Reg. 37,122 (July 19, 1977); 33 C.F.R. pt. 328; 45 Fed. Reg. 85,336 (Dec. 24, 1980); 40 C.F.R. pt. 230. The regulations define the agencies' jurisdiction to include navigable and tidal waters, tributaries, certain wetlands, impoundments, and all other waters "the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 230.3(s)(3).

could be regulated pursuant to the Commerce Clause, 42 Fed. Reg. at 37,144 n.2, the agencies recognized that many waters were outside the scope of their jurisdiction.[3] But since that time, proceeding largely case-by-case and occasionally by using "guidance," the agencies have "stretched the term 'waters of the United States' beyond parody." *Rapanos v. United States*, 547 U.S. 715, 734 (2006) (plurality opinion).

At the same time, regulated parties generally have been unable to challenge the agencies' overreaching. Over time, the agencies have eschewed notice and comment rulemaking as they stretched their jurisdiction, thus depriving the regulated community of the ability to comment on and ultimately gain judicial review of rules defining jurisdiction. And when regulated parties have attempted to challenge agency guidance or case-by-case jurisdictional claims in court, the agencies have persuaded the lower courts that such jurisdictional claims are unreviewable. "Guidance" is argued to be non-binding and therefore immune from review, and case-by-case claims are characterized as "preliminary" and likewise immune. In this way, the agencies largely have insulated themselves from judicial oversight. This case provides the Court an opportunity to ensure that there is an effective judicial check in the system, as Congress intended.

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[3] *See* 45 Fed. Reg. 33,290, 33,398 (May 19, 1980) (preamble) ("[S]mall, isolated wet areas may not be waters of the United States . . . because . . . their destruction or degradation would not have any effect on interstate commerce."); *see also, e.g.*, EPA, *Decision of the General Counsel on Matters of Law Pursuant to 40 C.F.R. § 125.36(m)* (Sept. 18, 1975) (creek in Ely, Nevada not jurisdictional).

I. Administrative Theories of Jurisdiction Under the Clean Water Act

This Court has reviewed the scope of CWA jurisdiction three times, and twice in the last decade has rejected the agencies' overbroad jurisdictional theories. Despite this Court's admonitions, the agencies continue to advance overly expansive positions.

A. The "Anywhere a Bird Can Land" Theory

In 1985, the Court, in its first case addressing the proper interpretation of "the waters of the United States," upheld the agencies' interpretation that the CWA covers wetlands that actually abut a traditional navigable waterway. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). Critical to the Court's finding was that the agencies' position on jurisdiction was based on an extensive rulemaking record. Deferring to "the Corps' and EPA's technical expertise," the Court found that the "Corps' conclusion that adjacent wetlands are inseparably bound up with the 'waters' of the United States" was reasonable. *Id.* at 134. The Court expressly declined to rule on whether federal jurisdiction extends to *isolated* waters (*i.e.*, wetlands and other waters that are not adjacent to navigable waters). *Id.* at 131 n.8.

Instead of engaging in rulemaking to address the open question of isolated waters, however, the agencies—in a pattern that has repeated itself time and again—developed a new legal theory behind closed doors. They announced that theory in 1985 through a legal memorandum prepared by EPA's general counsel. The memorandum declared that

use by birds could establish the requisite Commerce Clause nexus to establish CWA jurisdiction over remote waters.[4] Accordingly, the memorandum concluded, waters that could be used by migratory birds are "waters of the United States." The Corps then, in the preamble to a 1986 Federal Register notice, said that EPA's memorandum had "clarified" that the waters of the United States include waters that "are or would be used as habitat" by "[i] birds protected by Migratory Bird Treaties, or ... [ii] other migratory birds which cross state lines." 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

Through this bird test, the agencies claimed jurisdiction over literally any "water," no matter how small or how far removed from interstate or navigable waters, if the water was used or could be used by birds that cross State lines. "Use" meant any kind of use, including a brief landing. Thus, virtually no area was excluded from CWA jurisdiction because, of course, birds can land anywhere. Indeed, the migratory bird theory was so all-encompassing that it obviated the need for the agencies to even refer to their regulations to impose jurisdiction.

A study conducted by the Corps in 1995 documented the breadth of the bird test in establishing federal jurisdiction over remote wetlands. The study was undertaken to determine the number and acreage of isolated wetlands that were less than one-half

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[4] *See* Memorandum from Francis S. Blake, Gen. Counsel, EPA, to Richard E. Sanderson, Acting Assistant Adm'r, EPA, "Clean Water Act Jurisdiction over Isolated Waters" (Sept. 12, 1985). This theory came to be known as the "Migratory Bird Rule," but it was never adopted through Administrative Procedure Act ("APA") rulemaking.

acre in size—*i.e.*, areas that would likely not be jurisdictional but for the bird test. Looking at 41 states, the study identified 8,309,502 discrete isolated wetlands smaller than half an acre; they averaged one-quarter acre in size. Thus, under the bird test, more than eight million isolated wetlands were subject to federal regulation because they could be used by birds.[5]

Regulated parties attempted to challenge the bird theory in court, but as discussed below, their cases generally were dismissed on procedural grounds and never reached the merits. One case that did reach the merits, *Tabb Lakes, Ltd. v. United States*, No. 89-2905, 1989 WL 106990 (4th Cir. Sept. 19, 1989), held that the bird test was invalid because it had not been adopted in accordance with APA notice and comment requirements. In response, the Corps and EPA headquarters issued guidance stating that the "decision was incorrect."[6] Furthermore, because the case was "limited to the procedural notice-and-comment issue," the agencies "expect[ed] [field] offices . . to continue to regulate isolated waters"—even within the Fourth Circuit. *Tabb Lakes* Guidance ¶ 5. The guidance also stated that the agencies would undertake a rulemaking to address jurisdiction over isolated waters "as soon as possible." *Id.* ¶ 2. No such rulemaking was ever proposed.

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[5] U.S. Army Corps of Eng'rs, 1995 Wetlands Delineation Field Evaluation Forms (June 1995).

[6] Memorandum from John Elmore, Dep't of the Army, Directorate of Civil Works, & David Davis, EPA, Office of Wetlands Protection, "Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *Tabb Lakes v. United States*," ¶ 3 (Jan. 24, 1990) ("*Tabb Lakes* Guidance").

The migratory bird theory thus dominated the jurisdictional landscape until *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"). *SWANCC* considered the Corps's determination that it had jurisdiction over small isolated ponds that were created when rain fell at an abandoned sand and gravel pit because birds used the ponds. In rejecting jurisdiction over these ponds—and the migratory bird theory more generally—the Court explained that the CWA's use of the term "navigable waters" demonstrates Congress's understanding that its authority for enacting the CWA was its "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172. As such, the Court found that the Corps's attempt to assert jurisdiction over isolated waters because they were used as habitat by migratory birds was "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *Id.* at 173. The Court further explained that it was the "significant nexus" between the wetlands and the "navigable waters" to which they abutted that informed its reading of the CWA in *Riverside Bayview*, and that *Riverside Bayview* did not establish that the Corps's jurisdiction "extends to ponds that are *not* adjacent to open water." *Id.* at 167-68 (emphasis in original).

B. The "Any Connection" Theory

Rather than heed *SWANCC*'s reasoning, the agencies attempted to side-step *SWANCC* by claiming that the Court's decision dealt solely with "iso-

lated" waters.[7] If a water was not "isolated"—if it connected in any way to navigable waters—the agencies claimed that the water could be regulated as a "water of the United States." Thus was born the "any connection" theory of jurisdiction.

This theory *expanded* the agencies' jurisdiction. Ditches, previously excluded from jurisdiction,[8] became the "connection" of choice. Farm ditches, roadside ditches, flood control ditches—all common across the American landscape—became "tributaries," a term undefined in the regulations. These ditches provided the "connection" so that upstream areas previously considered "isolated" and therefore regulable only under the bird theory could nonetheless be deemed "waters of the United States." Like the migratory bird test that preceded it, the "any connection" theory reached all wet areas, no matter how small or remote, because, as a matter of basic science, all water is connected to all other water through the hydrological cycle.

In California's Central Valley, for example, the Corps had determined prior to *SWANCC* that two cattle waste ponds were waters of the United States because they were used by migratory birds, and that a nearby farm ditch was non-jurisdictional.[9] After

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[7] Memorandum from Gary S. Guzy, Gen. Counsel, EPA, & Robert M. Anderson, Chief Counsel, U.S. Army Corps of Eng'rs, to Distribution, "Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters" (Jan. 19, 2001) (providing the agencies' interpretation of *SWANCC*), *available at* http://www.spn.usace.army.mil/regulatory/misc/swancc.pdf.

[8] *See* 40 Fed. Reg. 31,320, 31,321, 31,324-25 (July 25, 1975); 42 Fed. Reg. at 37,127, 37,144.

[9] Letter from Justin Cutler, Project Manager, Delta Office, U.S. Army Corps of Eng'rs, Sacramento Dist., to James Gibson, Gib-

SWANCC, the property owner asked the Corps to disclaim jurisdiction over the ponds, only to be told that the ditch was now a tributary subject to jurisdiction, and, thus, the waste ponds remained jurisdictional—this time because they were "adjacent" to a tributary.[10]

The agencies' attempts to expand jurisdiction in the face of *SWANCC* did not go unnoticed. A 2004 study by the General Accounting Office documented numerous instances post-*SWANCC* in which Corps districts used underground drain tiles, storm drain systems, pipes, and even sheet flow (*i.e.*, rainfall runoff moving across the landscape) to establish a hydrological connection to recapture jurisdiction over otherwise isolated features.[11]

A good example is desert washes. These washes are not wetlands. They are commonplace drainages, pervasive across the Western landscape, which carry water only during occasional rainfalls. They often run only a few feet before they disappear from the surface, and most lack any surface connection to any true navigable water, even when it rains. At one 1,800-acre site in Arizona, for example, the

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son & Skordal (Aug. 24, 2000) at 1; Letter from James Gibson, Gibson & Skordal, to Justin Cutler, Project Manager, Delta Office, U.S. Army Corps of Eng'rs, Sacramento Dist. (Aug. 17, 2000) at 3.

[10] Letter from Michael Jewell, Chief, California/Nevada Section, U.S. Army Corps of Eng'rs, Sacramento Dist., to James Gibson, Gibson & Skordal (Aug. 13, 2001) at 1.

[11] U.S. GEN. ACCOUNTING OFFICE, GAO-04-297, WATERS AND WETLANDS: CORPS OF ENGINEERS NEEDS TO EVALUATE ITS DISTRICT OFFICE PRACTICES IN DETERMINING JURISDICTION, 24-26 (Feb. 2004), *available at* http://www.gpoaccess.gov/gaoreports.

Corps claimed jurisdiction over 43 discrete drainageways, including one that was one-half inch deep, 10 feet wide, and 100 feet long.[12] Sixteen of these drainages were less than five inches deep and seventeen were less than five feet wide.[13] Similarly, in Orange County, California, the Corps asserted jurisdiction over hillside gullies one foot wide by forty feet long.[14]

C. Jurisdictional Theories Post-*Rapanos*

The "any connection" theory did not last. In 2006, the Court considered this theory in the consolidated cases of *Rapanos v. United States* and *Carabell v. United States*, 547 U.S. 715 (2006) ("*Rapanos*"). In both cases, the agencies claimed jurisdiction because the sites at issue were connected tenuously to downstream navigable waters.

The Court emphatically rejected the agencies' any connection theory. The plurality decried the Corps's "'Land is Waters' approach to federal jurisdiction." *Id.* at 734 (plurality opinion). Justice Kennedy's concurrence likewise criticized the agencies' broad standard for leaving "wide room for regulation of drains, ditches and streams remote from any navi-

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[12] Appendix to Brief of The Serrano Water District, *et al.* as *Amici Curiae* in Support of Petitioner, at Ex. 10, Summary of U.S. Army Corps of Eng'rs Delineation of Ephemeral Drainages in Arizona, *SWANCC*, 531 U.S. 159 (2001) (No. 99-1178).

[13] *Id.*

[14] Appendix to Brief of The Serrano Water District, *et al.* as *Amici Curiae* in Support of Petitioner, at Ex. 4, U.S. Army Corps of Eng'rs Delineation of Site in Orange County, Cal., and Ex. 5, Ground-Level Photo of Jurisdictional Ephemeral Drainages in Ex. 4, *SWANCC*, 531 U.S. 159 (2001) (No. 99-1178).

gable-in-fact water and carrying only minor water volumes towards it," ultimately reaching wetlands "little more related to navigable-in-fact waters" than the isolated ponds in *SWANCC*. *Id.* at 781-82. The Justices unanimously agreed, moreover, that a rulemaking might have avoided this result, and invited the agencies to engage in rulemaking going forward. *See, e.g., id.* at 726 (plurality opinion); *id.* at 758 (Roberts, C.J., concurring) ("Rather than refining its view of its authority" through rulemaking, "the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency."); *id.* at 782 (Kennedy, J., concurring); *id.* at 812 (Breyer, J., dissenting) (calling for the agencies "to write new regulations, and speedily so").

But five years later, the agencies continue to exert jurisdiction ad hoc and by ever-changing guidance applied on a case-by-case basis. In fact, EPA and the Corps have proposed, and intend to finalize imminently, new CWA guidance that purports to define waters that are jurisdictional under the CWA.[15] The Draft Guidance once again takes an aggressive view of the agencies' jurisdiction, despite the loud call from this Court to cut back.

For example, after *Rapanos*, the agencies interpreted "the waters of the United States" to include "relatively permanent, standing or flowing bodies of water." *Id.* at 732 (plurality opinion). The Court had noted that the "relatively permanent" standard did

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[15] U.S. EPA & U.S. Army Corps of Eng'rs, "Draft Guidance on Identifying Waters Protected by the Clean Water Act," (May 2, 2011), *available at* http://www.water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm ("Draft Guidance").

not "necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months -- such as [a] 290-day, continuously flowing stream . . . Common sense and common usage distinguish between a wash and seasonal river." *Id.* at 732 n.5 (emphasis in original).

In their first post-*Rapanos* guidance, however, the agencies misconstrued the "relatively permanent" standard, claiming that it would be satisfied whenever a water flows "at least seasonally (e.g., typically three months)." Thus, the Court's 290-day example of waters "not necessarily excluded" morphed into a 90-day standard for waters always included.[16] The most recent Draft Guidance abandons even the three-month standard, requiring only "seasonal flow" and noting that "the time period constituting 'seasonal' will vary across the country."[17]

In addition, the *Rapanos* concurrence explained that wetlands are jurisdictional if they "alone or in combination with similarly situated lands in the region" have a significant nexus to traditional navigable waters. *Rapanos*, 547 U.S. at 780. Absent more specific regulations, the concurrence said, the agencies would be required to determine

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[16] U.S. EPA & U.S. Army Corps of Eng'rs, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*" at 6-7 (June 5, 2007), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm.

[17] Draft Guidance at 13. For additional examples of the agencies misconstruing *Rapanos* to expand CWA jurisdiction, see the discussion of "traditional navigable waters" in Brief of American Petroleum Institute, *et al.* as *Amici Curiae* Supporting Petitioners, *PPL Montana, LLC v. Montana*, No. 10-218, at 18-22 (U.S. Sept. 7, 2011).

case-by-case whether the individual wetland in question has a significant nexus. *Id.* at 782.

Sidestepping the call for case-by-case analysis, the Draft Guidance directs field staff to determine whether a particular water body has a significant nexus by aggregating the water at issue with all other "similarly situated" waters. If all those "similarly situated" waters, taken together, have a significant nexus to the nearest traditional navigable water, then the water in question will be deemed a water of the United States. Draft Guidance at 8.

In northern Arizona, for example, the criteria for aggregation set forth in the Guidance results in the aggregation of 17 million acres in the Little Colorado River watershed. Thus, jurisdiction over a wetland five miles from the Lower Colorado River will be decided by looking at a wetland 270 miles away.[18] If, in determining jurisdiction over one small wash in that watershed, the agencies are directed to aggregate all other washes in the 17 million acres, then it is inevitable that jurisdiction will be established, even though the wash in question may be hundreds of miles from a traditional navigable water and rarely if ever flow. Moreover, under the Draft Guidance, once jurisdiction is established for that one wash, jurisdiction will be presumed for all other washes in the watershed (although without notice to other affected landowners).

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[18] *See* Waters Advocacy Coalition, *et al.*, Comments in Response to the Environmental Protection Agency's and U.S. Army Corps of Engineers' Draft Guidance on Identifying Waters Protected by the Clean Water Act, Ex. 8, Docket No. EPA-HQ-OW-2011-0409-3514 (July 29, 2011), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-3514.

II. Lack of Judicial Oversight

This history of CWA jurisdiction teaches an important lesson: that the agencies take aggressive, and in many cases indefensible, positions on jurisdiction. They do so, moreover, using a variety of administrative tools. For example, in this case, Petitioners were subject to an ACO issued under 33 U.S.C. § 1319(a)(3). But ACOs are not the only means—and, indeed, not the most frequent means—through which the agencies determine their jurisdiction over particular land and water. Most notably, the Corps is authorized to issue "formal determinations concerning the applicability of the [CWA] to activities or tracts of land," which the Corps deems "final agency action." 33 C.F.R. § 320.1(a)(6). Such "formal determinations" include approved jurisdictional determinations ("AJDs"). 33 C.F.R. § 331.2; U.S. Army Corps of Engr's, Regulatory Guidance Letter No. 08-02, Jurisdictional Determinations (June 26, 2008) ("RGL 08-02"), *available at* http://www.usace.army.mil/cecw/pages/rglindx.aspx.

Regulated parties have sought judicial review of jurisdictional determinations made through ACOs, AJDs, and other means under the CWA. But they have been rebuffed by courts. These courts have reasoned that ACOs and AJDs are not "final agency action" under the APA, and/or that their review is impliedly precluded by the CWA.[19] For the reasons

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[19] *See, e.g., S. Pines Assocs. v. United States*, 912 F.2d 713, 717 (4th Cir. 1990) (denying ACO review); *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 566 (10th Cir. 1995) (same); *Hoffman Group, Inc. v. EPA*, 902 F.2d 567, 568 (7th Cir. 1990) (same); *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 593 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 2825 (2009) (denying AJD review).

described below, these cases misinterpret the law and ignore the reality that ACOs and AJDs are—both by design and in effect—conduct-altering regulatory tools.

Without judicial review of an ACO or AJD, regulated parties can get judicial review of a jurisdictional determination only by (a) proceeding through the expensive and time-consuming permitting process, obtaining a permit decision, and then challenging jurisdiction; or (b) ignoring the jurisdictional determination and proceeding with development, exposing themselves to massive daily penalties, and waiting on the government, whenever it wishes, to bring an enforcement action. As a practical matter, the price of these "alternatives" is so high that, in many cases, the prospect of judicial review is illusory.

By contrast, environmental groups have long been able to obtain immediate judicial review of agency jurisdictional claims that they question. *See, e.g., Golden Gate Audubon Soc'y, Inc. v. U.S. Army Corps of Eng'rs*, 717 F. Supp. 1417 (N.D. Cal. 1988); *National Wildlife Fed'n v. Hanson*, 623 F. Supp. 1539 (E.D.N.C. 1985). Thus, as it now stands, judicial review of jurisdictional determinations is a one-way ratchet—failing to check the agencies when they go too far, but, with the prospect of environmental lawsuits a constant part of the mix, pushing them to go further than Congress intended the CWA to reach.

ARGUMENT

This case comes to the Court in the form of an ACO. But the threshold question in this and every CWA case—regardless of the regulatory tool the agencies choose to employ—is whether the agencies

have the jurisdiction to act in the first place. The Court should hold that this threshold jurisdictional determination, whether in an ACO or AJD, is subject to judicial review.

ACOs and AJDs are not, as some courts have held, mere preliminary assessments of jurisdiction without sufficient consequence to support judicial review. To the contrary, they are consummated agency actions that are designed to—and in fact do—fundamentally alter the day-to-day conduct of citizens who receive them. Thus, ACOs and AJDs are "final agency action" judicially reviewable under the APA. Moreover, there is nothing in the CWA—much less clear and convincing evidence—suggesting that Congress intended to preclude judicial review of ACOs or AJDs. Indeed, far from being inconsistent with the CWA, judicial review would help to ensure that Congress's intention with regard to CWA jurisdiction, as reflected in this Court's decisions, is respected.

I. A Jurisdictional Determination Issued Through an Administrative Compliance Order or an Approved Jurisdictional Determination Is Judicially Reviewable.

The APA creates "'generous review provisions' [that] must be given a 'hospitable' interpretation.'" *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) (internal citations omitted). The APA creates a right to judicial review of all "final agency action," unless judicial review is precluded by statute. 5 U.S.C. §§ 701(a), 704. The test for "final agency action" is intended to be "pragmatic" and "flexible"—not mechanically applied. *Abbott Labs.*, 387 U.S. at 149-50;

FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 239 (1980).

Courts generally look at two factors in determining whether there is "final agency action." First is *finality*: the action must "consummat[e]" the agency's decisionmaking process. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Second is *effect*: the action must have an "effect on the day-to-day business of the party challenging it." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1278 (D.C. Cir. 2005) (internal quotation marks and citations omitted).

A. Administrative Compliance Orders and Approved Jurisdictional Determinations Consummate Agency Action.

Agency action is "consummat[ed]" when it concludes a distinct administrative act. The action "must not be of a merely tentative or interlocutory nature." *Spear*, 250 U.S. at 178. Instead, it must represent the "complet[ion]" of a "decisionmaking process." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992).

An ACO represents the "consummation" of an agency action. In order for an ACO to issue, the EPA Administrator must "*find[]*" based on the evidence available that there has been a "*violation*" of the CWA. 33 U.S.C. § 1319(a)(3) (emphasis added). Thus, by statute, EPA must consider the evidence and finally conclude that (a) there are "waters of the United States" present; and (b) the regulated party has violated the CWA. The ACO in this case, in fact, could not be clearer about its finality. *See* Pet'rs' App. G-1 to G-4 ¶¶ 1.1-1.14 (containing 14

"FINDINGS AND CONCLUSIONS," including a finding that there are jurisdictional waters on the property).[20]

Similarly, an AJD represents the "consummation" of the agencies' decisionmaking process. As the regulations make clear, an AJD—unlike a preliminary jurisdictional determination ("PJD")—is a *final* and *approved* determination that the agencies have CWA jurisdiction. 33 C.F.R. § 331.2 (defining an AJD as a "Corps document stating the presence or absence of waters of the United States on a parcel" and PJDs as "written indications that there may be waters of the United States on a parcel"). "[A]n [AJD] is an official Corps determination that jurisdictional [waters under the CWA] are either present or absent on a particular site." RGL 08-02 at 1; 33 C.F.R. § 320.1(a)(6) (AJD is "final agency action"). Thus, an AJD is the agency's "'last word' on whether it views the property as a wetland subject to regulation under the CWA" and thus represents the "consummation" of the decisionmaking process. *Fairbanks N. Star Borough*, 543 F.3d at 593.

The fact that some regulated parties may proceed to the permitting process after obtaining a posi-

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[20] Some courts holding that an ACO is "non-final" under the APA have wrongly analogized an ACO to the administrative complaint held to be non-final in *Standard Oil*. 449 U.S. at 241. But the administrative complaint there was based on a mere "reason to believe" there had been a violation and its sole purpose was to start further "adjudicatory proceedings." *Id.* By contrast, an ACO issued under the CWA must be based on an actual "find[ing]" of a CWA violation and operates like an injunction—not a mere complaint. 33 U.S.C. § 1319(a)(3). If anything, these differences demonstrate why ACOs *do* constitute final agency action.

tive AJD—and ultimately challenge jurisdiction after the permit decision—does not render the AJD non-final or otherwise support denying judicial review of an AJD. Finality is a function of an action's consummation, not its place in a potential administrative process. In fact, some landowners obtain an AJD for reasons other than development (*e.g.*, to determine land value), and thus have no need to go through the permitting process. If AJDs were deemed reviewable only after a permit decision, these landowners would be without a remedy to an erroneous jurisdictional determination. Moreover, for those wanting to engage in development, one purpose of an AJD is to determine *whether* they must go through the permitting process. It thus makes no sense to require these landowners to incur the cost and burden of the permitting process in order to gain judicial review of whether they should have been forced to go through that process in the first place.

B. Administrative Compliance Orders and Approved Jurisdictional Determinations Have the Requisite Effects.

The effects test focuses on whether the regulated party's operations are impacted by the agency action such that there is a concrete dispute in need of, and appropriate for, judicial resolution. *See, e.g.*, *Sharkey v. Quarantillo*, 541 F.3d 75, 89 (2d Cir. 2008) ("The APA requirement of final agency action relates closely to the prudential doctrine of ripeness."). This Court in *Spear* described two effects that will satisfy this test: the agency action is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Spear*, 520 U.S. at 178 (internal citations omitted).

These elements, however, are not to be applied mechanically. Instead, they are meant to inform the fundamental, pragmatic inquiry: Has the agency made a "definitive" decision on some matter that "has a direct and immediate . . . effect on the day-to-day business of the party challenging it"? *Nat'l Ass'n of Home Builders*, 417 F.3d at 1278 (internal quotation marks and citations omitted). Here, the determination that jurisdiction exists, be it in an ACO or an AJD, satisfies this test because it defines the rights and obligations of regulated parties under the CWA, imposes the risk of sanctions, affects land values, halts further development, alters development choices, imposes delay, and affects investment.[21]

Both an ACO and AJD, by regulatory design, determine regulated parties' rights and obligations and alter their conduct. *See* 33 U.S.C. § 1319(a)(3) (authorizing an ACO after the EPA Administrator "find[s]" CWA jurisdiction and a violation of the CWA); 33 C.F.R. § 320.1(a)(6) (AJDs are "final agency action"). Indeed, the language of the ACO here leaves no doubt about its effects. After making a number of "FINDINGS AND CONCLUSIONS," the ACO "ORDERS" Petitioners to "remove all unauthorized fill material" and restore the land to its original

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[21] *See, e.g., Alaska Dep't of Envtl. Conservation v. U.S. EPA*, 244 F.3d 748, 750 (9th Cir. 2001) (finding the requisite effects because the EPA orders were intended to and had the effect of "halt[ing] construction at Cominco's Red Dog Mine facility at a considerable cost of both time and money to Cominco"), *aff'd* 540 U.S. 461, 483 (2004); *Nat'l Ass'n of Home Builders*, 417 F.3d at 1280 (finding the requisite effects because the nationwide permits, "[e]ither . . . through increased delay or project modification, . . . directly affect[ed] the investment and project development choices of those whose activities are subject to the CWA").

condition to the extent practicable. Pet'rs' App. G-4 ¶ 2.1.

Failure to comply with an ACO, moreover, will subject the recipient to up to $37,500 in *daily* penalties. 33 U.S.C. § 1319(d).[22] In addition, if a regulated party continues work in the face of an ACO, the party greatly increases the chance that the government will seek, and the court will impose, civil and even *criminal* penalties for violating the CWA. 33 U.S.C. § 1319(c)(1)-(2) (imposing criminal penalties for negligent and knowing violations of the CWA); *see also Leslie Salt Co. v. United States*, 789 F. Supp. 1030, 1032 (N.D. Cal. 1991).[23] Similarly, ignoring a positive finding of jurisdiction in an AJD makes it more likely that a landowner will be found not to

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[22] The Court of Appeals in this case reinterpreted the CWA to allow penalties only in the case of a *valid* ACO in order to avoid the due process violation that arises from exposing regulated parties to massive daily penalties without a hearing. *Sackett v. U.S. EPA*, 622 F.3d 1139, 1145 (9th Cir. 2010). But the canon of constitutional avoidance "has no application in the absence of statutory ambiguity." *Dep't of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 134 (2002) (internal quotation marks and citation omitted). Section 1319(d), which imposes penalties for violating "any order issued by the Administrator," unambiguously imposes penalties for violating an ACO, regardless of whether it is valid and above and beyond any penalties for violating the CWA.

[23] The risk of criminal and civil penalties is not theoretical. *See, e.g., United States v. Pozsgai*, 999 F.2d 719, 723 (3d Cir. 1993) (defendant sentenced to three years' imprisonment and fined $200,000 for depositing fill material onto land without CWA permit); *United States v. Ellen*, 961 F.2d 462, 464 (4th Cir. 1992) (environmental consultant sentenced to 6 months' imprisonment and one year of supervised release for supervising the filling of wetlands in connection with a wildlife sanctuary project).

have acted in "good-faith" and thus be subject to a higher civil penalty for violating the CWA. 33 U.S.C. § 1319(d); *cf. United States v. Key West Towers, Inc.*, 720 F. Supp. 963, 965-66 (S.D. Fla. 1989) (finding the "good-faith" factor "strongly compels the court to impose a substantial civil penalty" because the defendants filled wetlands in the face of a cease-and-desist order).

These potential penalties leave the regulated party effectively with no choice but to concede to the agencies' imposition of jurisdiction. *See Riverside Irrigation Dist. v. Stipo*, 658 F.2d 762, 767 (10th Cir. 1981) ("The defendants argue that plaintiffs could proceed with construction and test the validity of the Engineer's position by incurring the civil and criminal penalties. It is apparent however that this is an unrealistic position. . . . Thus his act effectively has prevented construction to this day."). And this imposition of jurisdiction, both by design and in effect, has a number of significant consequences as described below.

Altering Development Choices. Realistically, a jurisdictional determination often will cause the recipient to modify or even abandon its project. A jurisdictional determination draws a line on a map. On one side of the line, the land may be developed without a CWA permit; on the other, development is forbidden unless the owner obtains a permit. Obtaining a permit typically takes at least a year, costs hundreds of thousands of dollars, and requires the support of expert technical consultants (and often lawyers). *See* David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59,

74 (2002) (study concluding that the average applicant spent $271,596 ($337,577 in 2011 dollar values) to prepare an individual section 404 permit application and $28,915 ($35,954 in 2011 dollar values) to prepare a nationwide permit application). Thus, regulated parties must determine whether it is rational to traverse the permit process in light of the financial costs and delay. Many determine that it is not, and thus modify the project to avoid alleged jurisdictional waters, or just give up on development.

Avoidance, Minimization, and Mitigation. For those that can bear the cost and delay associated with applying for a CWA permit, the regulations also impose certain avoidance, minimization, and mitigation requirements.[24] Avoidance requirements involve leaving some portion of an area proposed for development in an undisturbed condition. *See* 40 C.F.R. § 230.10(a)(1). Unless other land is made available for development, avoidance requirements result in a net loss of developable land. The cost of avoidance (*i.e.*, development foregone) averages about $400,000 per acre in Southern California, and can be well over $1 million per acre in some cities.[25] In extreme cases, the avoidance requirement can render an entire project infeasible, or force the appli-

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[24] In addition, applying for a permit under section 404 of the CWA triggers mandatory consultation with multiple state and federal agencies under, for example, the National Environmental Policy Act, the Endangered Species Act, the National Historic Preservation Act, and the CWA.

[25] David Sunding, *Review of EPA's Preliminary Economic Analysis of Guidance Clarifying the Scope of CWA Jurisdiction* at 3 (July 26, 2011) *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-3514 ("Sunding Analysis of EPA Guidance").

cant to move the project to another site. In the mining context, if the mineral resource is located in a jurisdictional area, the avoidance requirement may mean that the resource can never be extracted.

Minimization requirements mandate that permittees take steps to minimize potential adverse impacts. 40 C.F.R. § 230.10(d). Among other things, minimization requirements may force the permittee to change the location of the project, change the material to be discharged, control the material after the discharge, change the method of dispersion, change the technology used, or downsize the project to avoid adverse effects. *Id.* §§ 230.70-77.

Mitigation requirements obligate permittees to undertake compensatory actions (*e.g.*, restoration of existing degraded wetlands or creation of man-made wetlands). 40 C.F.R. § 230.91(c)(3). The cost of mitigation can be significant. For example, one form of compensatory mitigation is a mitigation bank, which is an aquatic resource area that has been restored, established, enhanced, or preserved by a party other than the permittee to provide compensation for unavoidable impacts to aquatic resources permitted under section 404. Permittees can purchase credits from a mitigation bank to meet their requirements for compensatory mitigation. Mitigation bank prices for seasonal wetlands are over $200,000 per acre in the Sacramento region. Sunding Analysis of EPA Guidance at 4.

Decreasing Land Value. Even for parties not in the development process—like property owners that obtain an AJD to determine land value—a positive jurisdictional determination has enormous consequences because it decreases land value. For

example, banks have called loans or demanded more collateral to secure a loan when it turned out that the mortgaged property was subject to CWA regulation. The CWA jurisdictional status of land is often not at all obvious, and indeed, wetland delineations by experienced delineators can lead to different results. Only an official determination by the Corps or EPA can establish whether land is (or is not) jurisdictional and define the boundaries of jurisdiction on the land. In one case in the Norfolk, Virginia, area, for example, the appraisal value of mortgaged land was reduced from over $32 million to less than $1 million when the Corps determined that the land contained "waters of the United States." Because of their effects on land values, ACOs and AJDs also can affect tax assessments, and trigger SEC reporting requirements under 17 C.F.R. § 229.103. *See, e.g., Bergen Cnty. Assocs. v. Borough of E. Rutherford*, 12 N.J. Tax 399, 403, 411, 418 (N.J. Tax Ct. 1992) (land that had been valued at $47,500,000 reduced to $2,029,800 based on determination that land included "waters of the United States").

For all these reasons, jurisdictional determinations through ACOs and AJDs are intended to—and in fact do—concretely alter the day-to-day conduct of regulated parties.[26] Because the whole point

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[26] Courts that have declined to hold that the effects test is satisfied with respect to an AJD primarily have reasoned that an AJD merely expresses the agency's view of the CWA, and all legal effects flow from *the CWA itself*. *See Fairbanks N. Star Borough*, 543 F.3d at 593-94 (reasoning that the regulated party's "legal obligations arise directly and solely from the CWA"). The entire premise of this reasoning is off. Rights and obligations (other than constitutional ones) are always derived ultimately from statutes or regulations. Agencies, of course, "determine" their application in orders, rules, and other types of

of the APA is to allow parties impacted by a consummated agency action to challenge that action in court, nothing more is, or should be, required.

II. The Clean Water Act Does Not Preclude Judicial Review.

Although ACOs and AJDs are final agency action under the APA, a number of courts nevertheless have found judicial review impliedly precluded by the CWA. These courts ignore that an agency's exercise of jurisdiction over a citizen is an extraordinary act, and courts should not "lightly infer that Congress" intends to deprive citizens of a judicial check "against agency action taken in excess of delegated powers." *Leedom v. Kyne*, 358 U.S. 184, 190 (1958). Indeed, "[o]nly upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review" of agency action. *Abbott Labs.*, 387 U.S. at 141. No such evidence exists here.[27]

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agency action. But this reality, flowing from the underlying structure of our administrative regime, does not mean that a party is somehow unaffected by agency action or imply that agency action is not "final" under the APA. *See, e.g.*, *Spear*, 520 U.S. at 177–78 (holding that a biological "opinion" that applied statutory standards was "final agency action").

[27] The decisions finding implied preclusion, like the Ninth Circuit's decision here, primarily involve ACOs. These decisions, as described above, are wrong. Moreover, there is no basis to find that the CWA impliedly precludes review of AJDs. Indeed, the primary reason that courts have found judicial review of ACOs impliedly precluded—that it would defeat the "choice" between issuing an ACO or initiating an enforcement proceeding provided by 33 U.S.C. § 1319(a)(3)—is absent with respect to AJDs.

At the outset, it bears emphasis that Congress has *not* included language in the CWA precluding review of ACOs under the APA as it has in other environmental statutes.[28] Congress's choice not to do so in the CWA should be respected, not ignored.

Nevertheless, the Court of Appeals stepped into the shoes of Congress and divined that Congress must have "*impliedly* preclude[d] judicial review" of ACOs. *Sackett*, 622 F.3d at 1143 (emphasis added). The Court of Appeals primarily reasoned that "Congress gave the EPA a choice of 'issuing an order requiring such person to comply with section or requirement, *or* . . . . bring[ing] a civil action [in district court].' 33 U.S.C. § 1319(a)(3) (emphasis added)." *Id.* at 1143. Thus, authorizing judicial review of ACOs "would eliminate th[at] choice by enabling those subject to a compliance order to force the EPA *to litigate all compliance orders in court*." *Id.* (emphasis added). This reasoning is not persuasive.

Section 1319(a)(3) does grant the Administrator an additional sword—an ACO—to compel compliance with the CWA without the need for litigation. But there is no reason to believe that Congress intended this additional sword in the hand of the government to remove a shield in the hand of the

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[28] By contrast, Congress *explicitly* precluded judicial review of compliance orders in the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). *See* 42 U.S.C. § 9613(h). Congress's explicit preclusion of judicial review in CERCLA, moreover, is one example of why many courts have erred in relying on Clean Air Act and CERCLA cases denying review of ACOs to hold that Congress precluded review of ACOs issued under the CWA. Each of these statutes has a different text, structure, and purpose and thus each must be analyzed individually.

regulated party. The Court of Appeals seemed to be laboring under the assumption that the agencies will be "force[d] . . . to litigate all compliance orders in court." *Sackett*, 622 F.3d at 1143. Not so.

Only close cases or ones involving egregious agency action will be challenged. Even where there is a basis for challenge, moreover, the reality is that many parties lack the ability or desire to sue the federal government. This is especially true since going to court exposes the regulated party to the risk of monetary penalties. Thus, even where jurisdiction is questionable, a party in receipt of an ACO is strongly incentivized to negotiate a remedy with the agencies to avoid the risks, costs, and burdens of litigation, and to continue with the project. Thus, in most cases, an ACO will ensure compliance without the need for litigation, thus effectuating Congress's purpose in creating an administrative enforcement tool.

But this does *not* mean that Congress intended—in those cases where the agencies have stepped over the bounds—to foreclose the regulated party's ability to challenge the ACO in court. In other words, it would be perfectly sensible for Congress to provide a mechanism that could force compliance without the need for litigation in most cases, while still leaving intact the presumptive ability of a regulated party to judicial review in questionable cases. At least there is no clear and convincing evidence to the contrary.

Moreover, allowing judicial review of an ACO will not prohibit the agencies from swiftly "address[ing] environmental problems," or cause a flood of litigation that will disrupt CWA enforcement. *Sackett*, 622 F.3d at 1144. The disincentives noted

above will, in most cases, deter judicial challenges; in the minority of cases in which a regulated party does challenge an ACO, the courts are well able to implement measures (like requiring the regulated party to halt development) to protect the environment during the pendency of any challenge. Moreover, the marginal increase in cases resulting from the availability of judicial review will lead to more case law and thus better guidance to the regulated community, regulatory staff, and other stakeholders, all of whom now must "feel their way on a case-by-case basis." *Rapanos*, 547 U.S. at 758 (Roberts, J., concurring). In the long run, this will lead to *less* litigation as the regulated community and Corps field staff will better understand the metes and bounds of the CWA, and what it takes to comply with its mandates. And even if the availability of judicial review does result in some burden on the agencies, the very purpose of the APA is to "'reasonably protect private parties even at the risk of some incidental or possible inconvenience to, or change in, present administrative operations.'" *Diebold v. United States*, 947 F.2d 787, 795 (6th Cir. 1991) (quoting S. DOC. NO. 248, at 301, 79th Cong., 2d Sess. (1946)).

To the extent there is any ambiguity regarding whether the CWA prohibits review, that ambiguity should be resolved in favor of judicial review to avoid the serious due process concerns raised by precluding review of ACOs. *See Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989). An ACO, as noted above, is self-executing: a violation of the ACO, even if there is no jurisdiction or violation of the CWA, is punishable by severe penalties. And, even if it is not self-executing—even if only *valid* ACOs are punishable—an ACO makes it more likely that a regulated

party will be exposed to severe civil and criminal penalties if it is later found to violate the Act. *See supra* at 23-24.

In this circumstance, due process is not satisfied by allowing judicial review of an ACO only (i) *after* the arduous permitting process or (2) *after* the regulated party violates the ACO and incurs massive penalties and *after* the government decides, at its discretion, to bring an enforcement proceeding. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994) (explaining a delay in judicial review violates due process where "compliance is sufficiently onerous and coercive penalties sufficiently potent" so as to present an "intolerable choice" to the regulated party).[29]

There is no basis to find—much less clear and convincing evidence—that Congress impliedly precluded judicial review of ACOs or AJDs issued under the CWA.

* * * * * * *

The APA, CWA, and case law fully support that jurisdictional determinations through ACOs and AJDs are final agency action subject to judicial review. This conclusion also is supported by sound policy considerations.

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[29] Even if a regulated party is successful in defending an enforcement action, moreover, it is likely to expend a considerable sum without any recovery of attorney fees or expenses. *See United States v. Marion L. Kincaid Trust*, 463 F. Supp. 2d 680, 696-97 (E.D. Mich. 2006) (denying defendant's motion for attorney fees and certain costs despite defendant's successful challenge to CWA jurisdiction).

Regulated parties have been and, if history is any guide, will continue to be subject to unwarranted impositions of jurisdiction under the CWA. When this occurs, regulated parties should not have to spend hundreds of thousands of dollars in the permitting process—or expose themselves to extraordinary penalties if and when the government brings an enforcement action—in order to be able to test the imposition of jurisdiction in court.

The presence of judicial review also is a disciplining mechanism that affects the regulatory choices of the agencies. As it now stands, there is no real threat of judicial review to restrain overly aggressive jurisdictional determinations. By contrast, where environmental groups perceive the agencies as not going far enough, they can challenge the agencies in court. The result is an unbalanced system of "checks and balances" that incentivizes agencies to take overly aggressive enforcement positions.

Finally, the purpose of the CWA is to protect "the waters of the United States"—*not* all waters *in* the United States. Allowing judicial review of ACOs and AJDs will ensure that the agencies do not reach beyond this more limited, but critical, mission. Allowing judicial review, moreover, will not pose a threat to the agencies' ability to protect "the waters of the United States." Most ACOs and AJDs will continue to go unchallenged, even if judicial review is available. Moreover, where there are judicial challenges to an ACO or AJD, the courts can impose requirements on regulated parties to protect the environment during the pendency of any suit.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

CHANTELL SACKETT and MICHAEL SACKETT,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *et al.*,

Respondents.

On Writ of *Certiorari* to the U.S. Court of Appeals for the Ninth Circuit

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AMICUS CURIAE BRIEF OF APA WATCH IN SUPPORT OF NEITHER PARTY

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24

QUESTIONS PRESENTED

1. May petitioners seek pre-enforcement judicial review of the administrative compliance order pursuant to the Administrative Procedure Act, 5 U.S.C. §704?

2. If not, does petitioners' inability to seek pre-enforcement judicial review of the administrative compliance order violate their rights under the due process clause?

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Authorities iii

Interest of *Amicus Curiae* 1

Statutory and Regulatory Provisions Involved 2

Statement of the Case 7

Summary of Argument 7

Argument 8

I. Parties Injured by Non-Final or Intermediate Agency Action Are Entitled to Judicial Review .. 8

A. APA Allows Pre-Enforcement Review 10

B. Equity Allows Pre-Enforcement Review 13

C. When Both the APA and Garden-Variety Equity Review Are Lacking, those Injured by Agency Action Nonetheless Can Have Judicial Review 17

II. When Judicial Review Is Available, Due Process Issues Are Absent 18

Conclusion 18

TABLE OF AUTHORITIES

Cases

Air New Zealand Ltd. v. C.A.B., 726 F.2d 832 (D.C. Cir. 1984) 10

Am. Life Ins. Co. v. Stewart, 300 U.S. 203 (1937) ... 15

Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902) 14

Astra USA, Inc. v. Santa Clara County, Cal., No. 09-1273 (U.S.) 1

Baker v. Gen. Motors Corp., 522 U.S. 222 (1998) 9

Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) 15

Board of Governor's of the Federal Reserve System v. MCorp Financial, 502 U.S. 32 (1991) 17-18

Bowen v. Massachusetts, 487 U.S. 879 (1988) 16

Bristol-Myers Squibb Co. v. Shalala, 91 F.3d 1493 (D.C. Cir. 1996) 6

Califano v. Sanders, 430 U.S. 99 (1977) 15-16

Cooper Indus., Inc. v. Aviall Serv., Inc., 543 U.S. 157 (2004) 9

Darby v. Cisneros, 509 U.S. 137 (1993) 16-17

Dart v. U.S., 848 F.2d 217 (D.C. Cir. 1988) 14

Douglas v. Independent Living Ctr. of S. California, Inc., Nos. 09-958, 09-1158 & 10-283 (U.S.) 1

Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978) 15

Envtl. Defense v. Duke Energy Corp., No. 05-848 (U.S.) 1

Ex parte Young, 209 U.S. 123 (1908) 13

Harmon v. Brucker, 355 U.S. 579 (1958) 14

Heckler v. Ringer, 466 U.S. 602 (1984) 16
Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 13
Leedom v. Kyne, 358 U.S. 184 (1958) 17
Morton v. Mancari, 417 U.S. 535 (1974) 16
Schlesinger v. Councilman, 420 U.S. 738 (1975) 16
Scripps-Howard Radio v. F.C.C., 316 U.S. 4 (1942) 12
Sea-Land Serv., Inc. v. Alaska R.R., 659 F.2d 243 (D.C. Cir. 1982) 5
South Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160 (1999) 9
Steffel v. Thompson, 415 U.S. 452 (1974) 15
Stormans Inc. v. Selcky, No. 07-36039 (9th Cir.) 1
Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) 9-10, 18
U.S. v. Lee, 106 U.S. 196 (1882) 13
U.S. v. Mitchell, 463 U.S. 206 (1983) 16
Waters v. Churchill, 511 U.S. 661 (1994) 9
Zeneca, Inc. v. Shalala, 213 F.3d 161 (4th Cir. 2000) 6-7, 12

Statutes

Administrative Procedure Act, 5 U.S.C. §§551-706 ..... *passim*
5 U.S.C. §559 ..... 2, 10
5 U.S.C. §701(a) 2-3
5 U.S.C. §701(a)(1) 10
5 U.S.C. §702 ..... 3-4, 10
5 U.S.C. §703 ..... 4, 7, 11
5 U.S.C. §704 ..... 5-6, 8, 11, 13, 17
5 U.S.C. §705 ..... 6, 11-13

28 U.S.C. §1292(a)(1) 12
28 U.S.C. §1331 15-16
Declaratory Judgment Act,
28 U.S.C. §§2201-2202 15-17
28 U.S.C. §2201(a) 15
42 U.S.C. §405(h) 16
Pub. L. No. 96-486, §2(a), 94 Stat. 2369 (1980) 16

Legislative History

ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. (1946) 11, 12, 16
H.R. REP. NO. 96-1461, *reprinted in* 1980 U.S.C.C.A.N. 5063 16
S. REP. NO. 79-752 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. (1946) 12
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Rules and Regulations

Supreme Court Rule 37.6 1
21 C.F.R. §10.35 ..... 6, 12
21 C.F.R. §10.45(c) 6, 12

Other Authorities

A.B.A. Section of Admin. Law & Regulatory Practice, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1 (2002) 14
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Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967) 10

WILLIAM J. HUGHES, FEDERAL PRACTICE §25387 (1940 & Supp. 1945) 16

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae APA Watch is a nonprofit membership corporation headquartered in McLean, Virginia. On its own and through its membership, APA Watch devotes significant effort to combating federal agencies' exceeding their authority under the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"), and to seeking the legislatively and constitutionally intended balance for judicial review under the APA, its equity predecessors, and their state-law equivalents. APA Watch has participated as *amicus curiae* before this Court and the Courts of Appeals on issues under the APA, enforcement, and justiciability. *See Stormans Inc. v. Selecky*, No. 07-36039 (9th Cir.); *Envtl. Defense v. Duke Energy Corp.*, No. 05-848 (U.S.); *Astra USA, Inc. v. Santa Clara County, Cal.*, No. 09-1273 (U.S.); *Douglas v. Independent Living Ctr. of S. California, Inc.*, Nos. 09-958, 09-1158 & 10-283 (U.S.). While sympathetic to the petitioners' plight here, *amicus* APA Watch submits this brief in support of neither party in the interests of *future* litigants who choose to pursue similar relief under different APA and pre-APA

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[1] This *amicus* brief is filed with written consent of all parties; the petitioners' and respondents' written letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief, and no counsel for a party authored this brief in whole or in part, nor did any person or entity other than the *amicus* and its counsel make a monetary contribution to the preparation or submission of this brief.

theories of judicial review. As unfair as the petitioners' burdens under the Clean Water Act may be, it would be more unfair if issues that the petitioners declined to raise in this litigation bound not only the petitioners here but also future litigants in unrelated litigation.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

As amended, APA §12 addresses not only the effect of the APA on review provided (or limited) by other statutes but also the effect of other, post-APA statutes on APA review:

> This subchapter [and] chapter 7 ... do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. ... Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. *Subsequent statute may not be held to supersede or modify this subchapter [or] chapter 7 ... except to the extent that it does so expressly.*

5 U.S.C. §559 (emphasis added). As relevant here, APA §12 provides that subsequent statutes like the Clean Water Act do not supersede or modify APA review unless they do so expressly.

Consistent with APA §12, APA §10(1) recognizes that the APA does not override statutes that preclude review:

> (a) This chapter applies, according to the provisions thereof, except to the extent that -
>
> (1) statutes preclude judicial review[.]

5 U.S.C. §701(a). Similarly, APA §10(a) as amended waives the United States' sovereign immunity for prospective injunctive and declaratory relief but also provides that APA's "right of review" does not trump any statute that "expressly or impliedly forbids the relief which is sought" against the United States:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. *An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.* The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. *Nothing herein* (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) *confers authority to grant relief if any other statute that grants consent to suit*

expressly or impliedly forbids the relief which is sought.

5 U.S.C. §702 (emphasis added).

As amended, APA §10(b) defines the form of review as either the special statutory review proceeding under the relevant statute or, in the absence or the *inadequacy* thereof, any applicable form of legal action – *e.g.*, declaratory or injunctive relief – in any court of competent jurisdiction:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence *or inadequacy thereof*, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction ..., in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C. §703 (emphasis added). As is most relevant to situations like this litigation, the inadequacy of a special statutory review proceeding entitles litigants

to resort to courts of competent jurisdictions, which typically would mean a U.S. district court.[2]

For agency action not made reviewable by statute or without an adequate remedy in court, APA §10(c) (as amended) provides review of final agency action:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. *A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.* Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

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[2] While not critical here, APA's 1976 amendments "*eliminat[ed]* the sovereign immunity defense in *all equitable actions* for specific relief against a Federal agency or officer acting in an official capacity." *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1982) (*quoting* S. Rep. No. 94-996, 8 (1976)) (emphasis added) (Ginsburg, J.).

5 U.S.C. §704 (emphasis added). As relevant here, any preliminary or intermediate action not directly reviewable is subject to review upon review of the final agency action.

Finally, under APA §10(d) as amended, agencies and reviewing courts – including this Court – may grant interim relief from agency action:

> When an agency finds that justice so requires, *it may postpone the effective date of action taken by it, pending judicial review*. On such conditions as may be required and *to the extent necessary to prevent irreparable injury, the reviewing court*, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, *may issue all necessary and appropriate process to postpone the effective date of an agency action* or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. §705 (emphasis added). Although the respondents here have not done so, some federal agencies require that parties who seek interim relief from agency action first present the request to the agency, with judicial review available of the denial of interim relief, even before a merits decision from the agency (or judicial review of the merits decision from the agency) is available. 21 C.F.R. §§10.35, .45(c); *Bristol-Myers Squibb Co. v. Shalala*, 91 F.3d 1493, 1497 (D.C. Cir. 1996); *cf. Zeneca, Inc. v. Shalala*, 213 F.3d 161, 166 n.7 (4th Cir. 2000) ("denial of Zeneca's administrative petition for a stay of action ...

constitutes final agency action for purposes of judicial review under the APA").[3]

STATEMENT OF THE CASE

Amicus curiae APA Watch adopts the facts as reported by the Ninth Circuit and the district court. The only relevant fact is whether a party faces irreparable injury from non-final or otherwise preliminary or intermediate agency action.

SUMMARY OF ARGUMENT

By its terms, the APA allows district-court review of non-final agency action that causes irreparable harm when special forms of statutory review are inadequate to avoid such harms. 5 U.S.C. §703 ("form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence *or inadequacy thereof*, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction .... in a court of competent jurisdiction") (emphasis added); Section I.A, *infra*. Even without that APA review, pre-APA equity practice allows an action in equity when the action at law comes too late to avoid irreparable harm. *See* Section I.B, *infra*. Although not presented here, judicial review is available even when Congress impliedly intended to

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[3] APA expresses no view on whether a federal agency has the authority to promulgate rules that limit a federal court's jurisdiction to hear an action otherwise within the court's jurisdiction.

deny review. *See* Section I.C, *infra*. For all of the foregoing reasons, pre-enforcement review remains available to those irreparably injured by non-final or intermediate agency action, which obviates an answer to the second question presented under the Due Process Clause. *See* Section II, *infra*.

ARGUMENT

I. PARTIES INJURED BY NON-FINAL OR INTERMEDIATE AGENCY ACTION ARE ENTITLED TO JUDICIAL REVIEW

As signaled in the first question presented, the problem here arises if an agency order is neither "made reviewable by statute" nor "final agency action." 5 U.S.C. §704. If indeed the order here is intermediate or otherwise non-final, it might evade *pre-enforcement* APA review under APA §10(c): "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." *Id.* When facing costly compliance if the party acquiesces versus large potential penalties (or any other irreparable harm) if the party does not prevail in post-enforcement judicial review, the denial of pre-enforcement review presents a Hobson's choice: pay the potentially unlawful compliance costs or risk the penalties. While this is indeed an APA problem, it is easily avoided under the APA and in equity.

The following three sections establish that pre-enforcement review is available to avoid irreparable harm from non-final or intermediate agency action under the APA, pre-APA equity practice, and even in some instances where Congress has barred review. *See* Sections I.A-I.C, *infra*. At the outset, it appears

that the Sacketts have not raised some of the arguments that *amicus* APA Watch raises. Although APA Watch expresses no opinion on whether failure to raise these arguments waives them, it is clear that any resulting decision by this Court should not foreclose *future litigants* from raising and prevailing on these arguments.

First, the Sacketts' litigation decisions plainly do not bind future litigants in unrelated litigation. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 237-38 & n.11 (1998) (due process forbids binding non-parties with collateral estoppel). Indeed, it violates due process to use *stare decisis* to preclude new parties from re-litigating an issue. *South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167-68 (1999). Second, unless this Court squarely addresses these issues, the decision in this "case[] cannot be read as foreclosing an argument that [the Court] never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents," *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 170 (2004) (*quoting Webster v. Fall*, 266 U.S. 507, 511 (1925)). For both reasons, to avoid uncertainty in the lower courts, this Court should either "deal with" these arguments or make clear that it is not dealing with them.

Similarly, this Court's decision in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), does not – indeed *cannot* – resolve the availability of pre-enforcement review to avoid irreparable harm. Simply put, this Court held that the *Thunder Basin*

petitioner lacked -- or at least presented no evidence of -- irreparable harm. 510 U.S. at 216-17. Each of the three theories of review presented in Sections I.A-I.C. *infra*, require irreparable harm. Because *Thunder Basin* lacked that prerequisite to review, *Thunder Basin* is inapposite here.

A. APA Allows Pre-Enforcement Review

As explained, the APA does not override any pre-APA statute that *expressly or impliedly* denies review:

> Nothing herein ... confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. §702; *id.* §701(a)(1) (same). For post-APA statutes, however, the denial of review must be *express*. 5 U.S.C. §559. Nothing in the Clean Water Act *expressly* precludes pre-enforcement review.

Moreover, the APA expressly allows review even where special forms of statutory review exist but are inadequate to avoid irreparable harm:[4]

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[4] The Court perhaps should distinguish between nonstatutory review and special forms of statutory review, as the enactment of statutes such as the APA has rendered "nonstatutory" something of a "misnomer." *Air New Zealand Ltd. v. C.A.B.*, 726 F.2d 832, 836-37 (D.C. Cir. 1984) (Scalia, J.); *cf.* Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967).

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, *in the absence or inadequacy thereof*, any applicable form of legal action[.]

5 U.S.C. §703 (emphasis added). When statutory review is inadequate, a plaintiff may bring *inter alia* "actions for declaratory judgments or writs of prohibitory or mandatory injunction" in any "court of competent jurisdiction." *Id.*

In the absence of APA §10(d), APA §10(c) indeed might present the Hobson's choice that this case seeks to frame. *Compare* 5 U.S.C. §705 (allowing interim relief from agencies and reviewing courts) *with* 5 U.S.C. §704 (requiring final action). The Senate Judiciary Committee explained §10(d) as necessary to avoid putting parties "at their peril" before those parties can obtain judicial review:

> The second sentence authorizes courts to postpone the effective dates of administrative judgments or rules in cases in which, as by subjection to criminal penalties, parties could otherwise have no real opportunity to seek judicial review except at their peril. There is no reason why such a rule should not be recognized as to administrative agencies, since it is applied in the case of legislation-of Congress itself.

Senate Judiciary Committee Print (June 1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess., at 38 (1946) (hereinafter, "APA LEG. HIST.")

(collecting cases). The Committee also emphasized that APA §10(d) empowered courts (like agencies) to provide every form of interim relief except the power to grant an initial license:

> This section permits *either agencies or courts*, if the proper showing be made, to maintain the status quo. While it would not permit a court to grant an initial license, it *provides intermediate judicial relief for every other situation* in order to make judicial review effective. The authority granted is equitable and should be *used by both agencies and courts to prevent irreparable injury* or afford parties an adequate judicial remedy.

S. REP. NO. 79-752 (1945), *reprinted in* APA LEG. HIST., at 213 (emphasis added); *cf. Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 17 (1942) (recognizing courts' authority to stay administrative orders).

Some agencies have promulgated rules that require petitioning the agency for interim relief before seeking interim relief in court. 21 C.F.R. §§10.35, .45(c); *Zeneca*, 213 F.3d at 166 n.7 (denial of administrative stay is reviewable final agency action); *cf.* 28 U.S.C. §1292(a)(1) (allowing interlocutory appeals of denial of interim injunctive relief). In the absence of a formal agency process for seeking interim relief – and thereby obtaining a final agency action that denies interim relief – one can seek interim relief informally under APA §10(d), using the same process (*e.g.*, a demand letter) that one would use when threatened with irreparable harm by a private party. If the agency denies

interim relief. APA §10(d) authorizes judicial review of the denial of interim relief, even if APA §10(c) otherwise would deny such relief.[5]

B. Equity Allows Pre-Enforcement Review

Assuming *arguendo* that the APA neither provides judicial review nor waives sovereign immunity, sovereign immunity poses the question whether plaintiffs can seek relief against an agency officer acting outside his authority. Assuming again *arguendo* that the APA neither provides judicial review nor waives sovereign immunity, review in equity would nonetheless exist because "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949); *Ex parte Young*, 209 U.S. 123, 160 (1908) (officer acting without valid authority is "stripped of his official or representative capacity and is *subjected in his person* to the consequences of his *individual conduct*," and suit is "against [him] *personally as a wrongdoer* and not against the State") (emphasis added); *U.S. v. Lee*, 106 U.S. 196, 213 (1882) ("if the person who is the real principal ... be himself above the law ... it would be subversive of the best established principles to say that the laws could not

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[5] *Amicus* APA Watch makes these arguments in the alternative to the Sacketts' arguments that the order is final agency action. Pets.' Br. at 54-56, without disputing those finality-based arguments.

afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit") (*quoting Osborn v. U.S. Bank*, 9 Wheat. 738, 842 (1824)). Unlike her agency, Administrator Jackson cannot assert sovereign immunity here.

Under our common-law heritage, "[t]he acts of all [federal] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902). "Nothing in the subsequent enactment of the APA altered the *McAnnulty* doctrine of review .... It does not repeal the review of *ultra vires* actions recognized long before, in *McAnnulty*." *Dart v. U.S.*, 848 F.2d 217, 224 (D.C. Cir. 1988); *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958) (relying on *McAnnulty* for the proposition that "generally, judicial review is available to one who has been injured by an act of a government official which is in excess of his express or implied powers"). "Under the longstanding officer suit fiction ..., ... suits against government officers seeking prospective equitable relief are not barred by the doctrine of sovereign immunity." A.B.A. Section of Admin. Law & Regulatory Practice, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 46 (2002). Thus, provided that the plaintiff alleges an ongoing violation of federal law, longstanding equity practice allows suing federal officers who act beyond their lawful authority.

Equity traditionally required irreparable harm and the inadequacy of legal remedies. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959). But those threatened by future injury need not await their alternate legal remedy before filing suit in equity, and a *subsequent* legal remedy does not displace equity review: the "settled rule is that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter." *Am. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937). A party injured by unlawful agency action need not await the remedy at law provided by Congress when irreparable injury comes before that remedy.

With the advent of the Declaratory Judgment Act, 28 U.S.C. §§2201-2202 ("DJA"), equitable relief in the form of a declaration of the law is even more readily available that traditional equitable relief in the form of injunctions. The federal-question statute, 28 U.S.C. §1331, provides subject-matter jurisdiction for nonstatutory review of federal agency action. *Califano v. Sanders*, 430 U.S. 99, 105 (1977) (1976 amendments to §1331 removed the amount-in-controversy threshold for "any [federal-question] action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity") (*quoting* Pub. L. 94-574, 90 Stat. 2721 (1976)), and 28 U.S.C. §2201(a) authorizes declaratory relief "whether or not further relief ... could be sought." *Accord Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 70-71 n.15 (1978); *Steffel v. Thompson*, 415 U.S. 452, 471-72 (1974). Since 1976, §1331 has authorized DJA

actions against federal officers, regardless of the amount in controversy. *Sanders*, 430 U.S. at 105 (quoted *supra*). Declaratory relief makes it even easier for parties to obtain pre-enforcement review.[6]

Significantly, the availability of declaratory relief against federal officers predates the APA. WILLIAM J. HUGHES, FEDERAL PRACTICE §25387 (1940 & Supp. 1945); EDWIN BORCHARD, DECLARATORY JUDGMENTS, 787-88, 909-10 (1941), and the APA did not displace such relief, either as enacted in 1946 or as amended in 1976. *See* APA LEG. HIST., at 37, 212, 276; 5 U.S.C. §559; *Darby v. Cisneros*, 509 U.S. 137, 153 (1993) (rejecting argument that 1976 APA amendments expanded

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[6] In 1980, Congress amended §1331 to its current form, Pub. L. No. 96-486, §2(a), 94 Stat. 2369 (1980), without repealing the 1976 amendment relied on by *Sanders* and its progeny. H.R. REP. NO. 96-1461, at 3-4, *reprinted in* 1980 U.S.C.C.A.N. 5063, 5065; *Bowen v. Massachusetts*, 487 U.S. 879, 891 n.16 (1988); *U.S. v. Mitchell*, 463 U.S. 206, 227 & n.32 (1983); *cf. Morton v. Mancari*, 417 U.S. 535, 550 (1974) (repeal by implication is disfavored). Indeed, "'repeals by implication are disfavored,' and this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975). Statutes that foreclose alternate forms of review must do so expressly. *Compare* 42 U.S.C. §405(h) ("[n]o action against the United States... or any officer... thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter") *with Heckler v. Ringer*, 466 U.S. 602, 616-17 (1984) (assuming without deciding that §405(h)'s exclusion of jurisdiction *under 28 U.S.C. §1331* does not foreclose jurisdiction *under 28 U.S.C. §1361*).

APA's preclusion of review) (*citing* 5 U.S.C. §559 *and Dickinson v. Zurko*, 527 U.S. 150, 154-55 (1999)). Thus, even if APA §10(c) precludes declaratory relief *under the APA*, 5 U.S.C. §704, suitable plaintiffs nonetheless can obtain that relief *under the DJA*.

C. When Both the APA and Garden-Variety Equity Review Are Lacking, those Injured by Agency Action Nonetheless Can Have Judicial Review

Although not presented here, this Court has identified instances where due process provides forms of review even in the face of statutes that deny review. *See, e.g., Leedom v. Kyne*, 358 U.S. 184, 188-90 (1958) (allowing nonstatutory equitable review, notwithstanding that the statute in question impliedly prohibits judicial review). In *Board of Governor's of the Federal Reserve System v. MCorp Financial*, 502 U.S. 32, 43 (1991), the Court upheld the "familiar proposition" underlying *Kyne* review: namely, that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." 502 U.S. at 44 (*quoting Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967)). Because the *MCorp* statute *expressly* prohibited judicial review of the regulations at issue and *expressly* authorized a challenge to them only in an enforcement action, this Court withheld the *Kyne* action. 502 U.S. at 43-44. Significantly, *MCorp* found the statutory review adequate. 502 U.S. at 43 ("[t]he cases before us today are entirely different from *Kyne* because [the *MCorp* statute] expressly provides MCorp with a meaningful and adequate opportunity for judicial

review"), which removes *MCorp* (like *Thunder Basin*) from any relevance here.

II. WHEN JUDICIAL REVIEW IS AVAILABLE, DUE PROCESS ISSUES ARE ABSENT

The denial of review would present due-process issues, as the Sacketts and their *amici* ably argue. Because the APA and pre-APA forms of judicial review are available, however, due-process questions do not arise.

CONCLUSION

Whatever this Court decides on the facts and proceedings in this case, the Court should not preclude pre-enforcement judicial review to future plaintiffs: (1) who face irreparable harm from non-final agency action, or (2) for whom special statutory review is either inadequate or unavailable. Both the APA and pre-APA equity practice allow review of unlawful agency action under those circumstances.

October 3, 2011 Respectfully submitted,

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AMICUS CURIAE BRIEF

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AND
BRIEFS

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In the
Supreme Court of the United States

CHANTELL SACKETT, et vir,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS

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12

QUESTIONS PRESENTED

1. Does the Clean Water Act prohibit judicial review of orders issued by the Environmental Protection Agency prohibiting the use of private property, imposing significant costs on property owners, and threatening millions of dollars in civil penalties?

2. If review is prohibited, does that prohibition violate the Due Process Clause of the Fifth Amendment?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 3

I. THE CLEAN WATER ACT DOES NOT PRECLUDE JUDICIAL REVIEW OF EPA ORDERS 3

A. Intent To Preclude Judicial Review Should Not Be Inferred Unless Review Would Interfere with Ongoing Administrative Proceedings 5

B. Reliance on Cases Decided Under the Clean Air Act and CERCLA to Preclude Review of Orders Under the Clean Water Act is Erroneous 6

C. Nothing in the Text or History of the Clean Water Act Shows an Intent to Preclude Judicial Review 9

D. Intent To Preclude Judicial Review Should Not Be Inferred Where Constitutional Rights Are at Stake 13

II. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT PROTECTS INDIVIDUAL RIGHTS IN PROPERTY 14

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Abbott Labs v. Gardner, 387 U.S. 136 (1967).....4, 5, 9

Block v. Community Nutrition Institute, 467 U.S. 340 (1980).....3, 5, 6, 10

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986).....passim

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Dickerson v. Administrator, 834 F.2d 974 (11th Cir. 1987).....8

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).....1

Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995).....25

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 1

Hoffman Group v. EPA, 902 F.2d 567 (7th Cir. 1990) 7, 8

Jacobellis v. Ohio, 378 U.S. 184 (1964) 16

Lloyd A. Fry Roofing Co. v. United States EPA, 554 F.2d 885 (8th Cir. 1977).....7

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Wagner Seed Co. v. Daggett, 800 F.2d 310 (2nd Cir. 1986) 8

Webster v. Doe, 486 U.S. 592 (1988) 13, 14

Zelman v. Simmons-Harris, 536 U.S. 639 (2002) 1

Statutes

33 U.S.C. § 1319 .....9, 12

33 U.S.C. § 1319(a 10

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Rules

Local Civ Rule 65.1, Rules of the U. S. Dist.Court for the District of Columbia 12

Sup. Ct. R. 37.3(a) 1

Sup. Ct. R. 37.6.....1

Constitutional Provisions

N.H. Const. pt. 1, art. 2.....22

U.S. Const. amend. I 16

U.S. Const. amend. V 18, 23

U.S. Const. amend. XIV 18

IDENTITY AND INTEREST OF AMICI CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is dedicated to upholding the principles of the American Founding, including the individual liberties the Framers sought to protect by adoption of the Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000). The Center is vitally interested in effective judicial oversight of the exercise of power by administrative agencies—especially where that power interferes with the fundamental right to own and use property.

The National Federation of Independent Business (NFIB) is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States. The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The NFIB Legal Center frequently files amicus briefs in cases that will affect small businesses.

NFIB's membership includes ranchers, farmers, homebuilders and many others that would be adversely affected if judicial review were delayed until either the landowner has been denied a permit or is subject to an Environmental Protection Agency (EPA) enforcement action. As an organization that represents only the interests of small business owners, NFIB offers a unique perspective on the deleterious effects of the Ninth Circuit's ruling. Under this decision, landowners who have received a compliance order, that they believe is invalid, can get their day in court only by: (1) spending hundreds of thousands of dollars and years applying for a permit that they contend they do not even need, or (2) inviting the agency to bring an enforcement action for potentially hundreds of thousands of dollars in civil penalties for violations of the order, and criminal penalties for underlying violations of the Act. Either choice is financially untenable for a small business owner and would adversely affect the business's ability to operate or expand.

SUMMARY OF ARGUMENT

Since this Court's decision in *Block v. Community Nutrition Institute*, 467 U.S. 340 (1980) the Circuit and District Courts have struggled with the implied preclusion doctrine. These courts have found preclusion based on analogy to statutes that are not analogous, vague clues in legislative history, and even on the simple absence of an express provision for review. Lost in these cases is the strong presumption of judicial review reflected in the Administrative Procedure Act and this Court's later decision in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986). That strong presumption is not overcome by either the text or history of the Clean Water Act.

There is no evidence, convincing or otherwise, that Congress intended to permit EPA to issue unreviewable orders requiring property owners to vacate their property. Had Congress created such a scheme the protections of the Due Process Clause of the Fifth Amendment would require notice, a pre-deprivation hearing, and judicial review of any agency order.

ARGUMENT

I. THE CLEAN WATER ACT DOES NOT PRECLUDE JUDICIAL REVIEW OF EPA ORDERS

There is no doubt the Sacketts are the subject of a final agency action under the Clean Water Act. Their Administrative Compliance Order demands immediate and costly action on their part, failure of which can subject them to civil and administrative penalties over $1,000,000 per month. Judicial review

was given to the pharmaceutical companies in *Abbott Labs v. Gardner*, 387 U.S. 136 (1967), because "the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Id.* at152.

The Sacketts have been ordered by the EPA to "immediately undertake activities to restore the Site," including the costly restoration of soil, plants and ongoing monitoring. The order ejects them from their property and prohibits them from using the land for any viable purpose. The order does not contemplate any further administrative proceedings. The Sacketts had no hearing prior to the imposition of the order and they have no opportunity for a hearing afterwards either.

Because the order is final and demands immediate compliance, the order meets all the requirements for finality set out in *Abbott*. *Id.* Although the Clean Water Act is silent on judicial review of such orders, the Administrative Procedure Act establishes the strong presumption in favor of review. Section 704 expressly provides for review of "final agency action for which there is no other adequate remedy in a court." EPA's argument that there is no judicial review of its order ejecting the Sacketts from their property is an "extreme" one that this Court should be "most reluctant to adopt 'without a showing of "clear and convincing evidence"' to overcome the 'strong presumption that Congress did not mean to prohibit all judicial review' of executive action." *Bowen*, 476 U.S. at 680-81.

A. Intent To Preclude Judicial Review Should Not Be Inferred Unless Review Would Interfere with Ongoing Administrative Proceedings

As this Court noted in *Block v. Community Nutrition Institute*, the presumption of review can be overcome if Congress clearly intended review by another method. This Court's main concern in *Block* was to prevent a party from bypassing the hearing process that was provided to them by Congress in the Act. *Block*, 467 U.S. at 348. If the consumers in *Block* were allowed to seek judicial review of pricing orders, then the producers, by joining suit with the consumers, would have a way to bypass the hearing process designed by Congress to allow the agency to handle the issue in the first instance. *Id.*

This Court revisited *Block* and implied preclusion two years later, addressing the statutory scheme of Medicare in *Bowen v. Michigan Academy of Family Physicians*. In *Bowen*, this Court reaffirmed the basic principle of 5 U.S.C. § 704 that judicial review is the default rule. *Bowen*, 476 U.S. at 674. That presumption of review cannot be overcome by "slender and indeterminate evidence of legislative intent." *Id.* Instead, there must be "clear and convincing evidence" that Congress intended to preclude judicial review. *Id.* at 681 (*quoting Abbott Labs v. Gardner*, 387 U.S. at 141). Thus, the mere fact that a law provides expressly for review in some instances and is silent in others is insufficient to overcome the presumption of judicial review. *Bowen*, 476 U.S. at 674.

The message of both *Block* and *Bowen* is that preclusion of review should not be lightly inferred.

Congressional intent to preclude review might be inferred from the fact that such review would otherwise interfere with an express statutory scheme for review. *Block*, 467 U.S. at 348; *Bowen*, 476 U.S. at 675-76. Absent such interference, however, the strong presumption of review should prevail. *Bowen*, 476 U.S. at 681. This is especially true where the underlying action violates constitutional rights. *Brown v. Plata*, __ U.S. __, 131 S.Ct. 1910, 1937 (2011). The Circuit and District Courts have lost sight of these principles and have rushed to apply *Block* to preclude judicial review where there is no congressional intent (convincing or otherwise) that supports preclusion. Indeed, in a search for this missing congressional intent, lower federal courts have relied on cases arising under different environmental laws that have review provisions different from that provided under the Clean Water Act.

B. Reliance on Cases Decided Under the Clean Air Act and CERCLA to Preclude Review of Orders Under the Clean Water Act is Erroneous

Lower courts have incorrectly relied on cases interpreting provisions of the Clean Air Act and Comprehensive Environmental Response Compensation and Liability Act (CERCLA) to preclude review of administrative compliance orders under the Clean Water Act. Those laws, however, have significantly different review provisions. They cannot be relied on to decide congressional intent regarding review under the Clean Water Act and they certainly cannot provide "clear and convincing evidence" of an intent to preclude review.

The Seventh Circuit was apparently the first Circuit Court of Appeals to consider the question of implied preclusion under the Clean Water Act. *See Hoffman Group v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990). Finding no decisions under the Clean Water Act, the Seventh Circuit relied on cases decided under the Clean Air Act and CERCLA – but did so without reviewing the text or history of those laws. *Id.*

For instance, the *Hoffman* court relied on *Lloyd A. Fry Roofing Co. v. United States EPA*, 554 F.2d 885 (8th Cir. 1977), an Eighth Circuit opinion considering availability of review under the Clean Air Act. In that case, the Eighth Circuit relied on the fact that the Senate had originally proposed an express judicial review provision for compliance orders under the Clean Air Act but no such provision was attached to the version of the bill that cleared the Conference Committee. *Id.* at 890. Even if such a minor event in the convoluted history of legislation amounts to "clear and convincing evidence" of congressional intent to preclude review of orders issued pursuant to the *Clean Air Act*, that history says nothing about congressional intent underlying the *Clean Water Act*.

Further, unlike the Clean Water Act, the Clean Air Act does provide at least a hint of ongoing administrative proceedings. Under the Clean Air Act, compliance orders are not effective until the individual that is the subject of the order has an opportunity to first meet with EPA and discuss the terms and necessity of the order. 42 U.S.C. § 7413(a)(4) . That act also requires advance notice of the order. 42 U.S.C. §7413(a)(1). Thus, the Clean

Air Act has at least some indication of ongoing administrative proceeding. There is nothing similar or even analogous in the Clean Water Act.

The Seventh Circuit in *Hoffman* also relied on two cases decided under CERCLA: *Dickerson v. Administrator*, 834 F.2d 974 (11th Cir. 1987) and *Wagner Seed Co. v. Daggett*, 800 F.2d 310 (2nd Cir. 1986). Again, however, because the language of the statutes is different, CERCLA cases cannot be used to find congressional intent to preclude review of orders issued under the Clean Water Act. CERCLA contains an *express preclusion of judicial review*. *Dickerson*, 834 F.2d at 977-78. While this shows clear intent to preclude review under CERCLA, it indicates nothing about review under the Clean Water Act.

The Fourth Circuit followed the lead of the Seventh Circuit's *Hoffman* decision and ruled in *Southern Pines Associates v. United States*, 912 F.2d 713 (4th Cir. 1990), that there was no review of orders issued under the Clean Water Act. As did the Seventh Circuit, the Fourth Circuit relied on cases interpreting the Clean Air Act and CERCLA without noting how those laws differed from the Clean Water Act both in their text and their legislative history. *Id.* at 716.[2]

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[2] The Ninth Circuit also relied on *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981), for the proposition that unless there was a strong indication of congressional intent to allow review, the court should conclude that Congress authorized the only remedy they thought appropriate. Of course, this has the analysis precisely backwards. *Sea Clammers* concerned whether there was a

C. Nothing in the Text or History of the Clean Water Act Shows an Intent to Preclude Judicial Review

The 1972 amendments to the Federal Water Pollution Control Act created the basis of the current Clean Water Act, and marked the birth of the Administrative Compliance Order. Under the Act, the Administrator can respond to a violation by issuing an order (as was done in this case), seeking an injunction from the District Court, referring the matter for criminal prosecution, or instituting administrative proceedings for imposition of a civil penalty. 33 U.S.C. § 1319. The only *express* provision for judicial review relates to the imposition of civil penalties in an administrative proceeding. 33 U.S.C. § 1319(g)(8). Judicial participation (not review) is required for an injunction, criminal penalties, or assessment of penalties for violation of an administrative compliance order. The Act is silent on the procedure for obtaining any type of review of the compliance order itself. The general presumption from this silence is that judicial review is available. *Bowen*, 476 U.S. at 681, 5 U.S.C. § 704.

The fact that Congress provided an express review provision for administrative penalties in the Clean Water Act and was silent on the availability of review for compliance orders does not guide the analysis. This Court in both *Abbott Labs* and *Bowen* rejected the idea that express review in one portion of a law and silence in another is sufficient to imply preclusion of judicial review. *Bowen*, 476 U.S. at

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(continued) private right of action for money damages – not whether there was an implied preclusion of judicial review.

674; *Abbott Labs*, 387 U.S. at 141 ("The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent."). Thus, we must employ the analysis used in *Block* to determine whether the structure of the Act provides the "clear and convincing evidence" necessary to overcome the presumption of judicial review.

The primary concern in *Block* was that judicial review of the pricing orders by consumers had the potential to disrupt the "detailed mechanism" of administrative hearings meant to resolve disputes under that law. *Block*, 467 U.S. at 346-47. Contrary to the conclusions of lower federal courts, there is no similar "detailed mechanism" of review under the Clean Water Act.

First, the text of the Clean Water Act reveals no administrative mechanism for review. Orders are issued without hearing by the Administrator and are based on "any information," whatever its provenance or reliability. 33 U.S.C. § 1319(a). As already noted, the Act is completely silent on any review after the order is issued. Congress did not set out in the Clean Water Act the same "detailed mechanism" of administrative hearings that was at issue in *Block*. Once the Administrator issues an order, the administrative action is final.

EPA might argue that the fact that it amended the order in this case proves that "administrative proceedings" were ongoing. That argument misreads both the Court's decision in *Block* and the effect of amending the orders. *Block* was concerned with the administrative procedure established by Congress. *Block* , 467 U.S. at 346-47. By contrast, any

argument regarding the amendment of the orders in this case would simply establish that EPA can change its mind. This can have no legal effect, however. Otherwise, EPA would have to concede that it could never seek civil penalties for a violation of a compliance order since that order is always subject to change and the individual or company subject to the order cannot know when the order is actually "final." While EPA may be free to amend compliance orders, property owners like the Sacketts are required to adhere to those orders from the day they are issued. That is the process that Congress imposed in the Clean Water Act. Judicial review once the order is issued has no potential for interrupting any administrative process created by Congress.

Nor can the requirement of judicial involvement in the assessment of civil penalties be a basis for precluding judicial review of the order. Section 1319(d) merely provides that the Administrator can seek civil penalties in a judicial action for *violation* of the compliance order. Nothing in that section sets up a mechanism for actual review of the compliance order. The only issue before the court under section 1319(d) is the amount of the penalty. 33 U.S.C. § 1319(d). Again, there is nothing here at all similar to the administrative process that this Court sought to protect in *Block*. Simply stated, there is no ongoing administrative process that the court could interrupt.

Similarly, a silent congressional intent to preclude judicial review cannot be inferred by any need for EPA to take immediate action. Section 1319 specifically empowers the agency to seek an

injunction from a District Court in order to protect the environment. 33 U.S.C. §1319(a), (b). Applications for temporary restraining orders do not require any particular period of notice and many district courts even have procedures for presenting such an application outside of regular court hours. *See, e.g.*, Local Civil Rule 65.1, Rules of the United States District Court for the District of Columbia.

EPA may argue, of course, that such a procedure is inconvenient. The agency would be required to convince a neutral magistrate before it could eject a family from its property and impose significant costs on them. The agency would further be required to produce evidence of a violation and establish that the agency had jurisdiction over the property – all matters of dispute in the Sackett case. It would be much easier if EPA could issue its own injunctions without the need to prove its case to the court.

That is exactly how EPA is using the compliance order procedure. The compliance order acts as an injunction and carries the force of law. 33 U.S.C. § 1319; *see TVA v. Whitman*, 336 F.3d 1236, 1241 (11th Cir. 2003). Violation of the order is the basis for fines that can range as high as $1 million per month. 33 U.S.C. § 1319. If EPA can accomplish everything it wishes by administrative fiat without the need to prove its case to a court, why would it ever seek an injunction?

Allowing EPA to use the administrative compliance order in this manner – an injunction issued without hearing, without process, and protected from any judicial "interference," renders Congress' authorization for the Administrator to seek an injunction from the court as mere

surplusage. This Court has "cautioned against reading a text in a way that makes part of it redundant." *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 668 (2007). Yet if the Court were to interpret the Clean Water Act as precluding judicial review of orders, the provisions relating to injunctions become redundant and irrelevant. The fact that Congress did authorize the Administrator to seek an injunction is yet another piece of evidence arguing in favor of judicial review of the compliance order.

D. Intent To Preclude Judicial Review Should Not Be Inferred Where Constitutional Rights Are at Stake

In *Bowen* and again in *Webster v. Doe*, 486 U.S. 592 (1988), this Court has noted that where there is a colorable constitutional claim, any claimed intent on the part of Congress requires a "heightened showing." *Webster*, 486 U.S. at 603; *Bowen*, 476 U.S. at 681 n.12. As detailed below, there are significant concerns that denial of judicial review of this order would violate the Due Process Clause of the Fifth Amendment. Indeed, the issuance of the order itself raises serious due process concerns.

The order issued to the Sacketts requires them to vacate their land and to restore it to a previous condition. Amici argue in the next section that such an order constitutes a deprivation of property. It is important to note that the Sacketts did not receive any type of predeprivation hearing before the EPA issued this extraordinary order expelling them from their land.

The requirements of due process are flexible and will require different procedures based on the interests of individual and those of the government. *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976). Nonetheless, some type of hearing is required before an individual is required to suffer the deprivation of right to property. *Id.* at 333-334. There is no occasion in this case to define precisely what type of hearing is required before the compliance order could issue against the Sacketts. What is clear, however, is that some sort of hearing is required and that absolutely no procedures were actually afforded. EPA, however, continues to argue that a deprivation of property without any hearing (pre or post-deprivation) is not subject to review by any court. The Court should not lightly assume that Congress intended to test the limits of its power under the Due Process Clause to authorize the taking of property without any type of hearing. *Webster*, 486 U.S. at 603; *Bowen*, 476 U.S. at 681 n.12. There is no clear indication of any such congressional intent and judicial review should not, therefore, be precluded by implication.

II. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT PROTECTS INDIVIDUAL RIGHTS IN PROPERTY

It is no easy task for individual property owners to know whether their property is actually "the waters of the United States." EPA and the Corps of Engineers have yet to issue regulations defining their jurisdiction, leaving the question up to case-by-case administrative adjudication. Most property owners cannot survive in this regulatory environment

> The burden of federal regulation on those who would deposit fill material in locations denominated "waters of the United States" is not trivial. In deciding whether to grant or deny a permit, the U.S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot, relying on such factors as "economics," "aesthetics," "recreation," and "in general, the needs and welfare of the people," 33 CFR § 320.4(a) (2004). The average applicant for an individual permit spends 788 days and $271,596 in completing the process.

Rapanos v. United States, 547 U.S. 715, 721 (2006) (plurality opinion).

The process is more burdensome for those who have no intent to fill the "waters of the United States" and indeed have no idea that their property may fall within the definition of "waters."

This Court's decision in *Rapanos* produced five separate opinions on what constitutes the "waters of the United States" for purposes of the Clean Water Act—none of which commanded a majority of the Court. The Chief Justice noted in his separate concurring opinion that the Court would grant substantial deference to EPA and the Army Corps of Engineers if they exercise their rulemaking power to issue regulations defining the terms at issue in the case. *Id.* at 758. In the nearly five years since the *Rapanos* decision was issued, the agencies have declined to issue such a regulation. Instead, they have chosen to issue a "guidance" which they emphasize is not a "regulation" and does not "impose legally binding requirements on EPA, the Corps, or

the regulated community, and may not apply to a particular situation depending on the circumstances." Joint EPA-Army Corps of Engineers Memorandum issued on December 2, 2008, entitled Clean Water Act Jurisdiction following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*, at 4 n.17.

"Waters of the United States," it would seem, have now reached the status of Justice Stewart's definition of hard core pornography: "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). Justice Stewart and his colleagues were attempting to draw a line between what was protected by the First Amendment and what was not in the context of those who sought to push the boundaries of prior rulings. The Court was struggling to protect the liberties included in the Bill of Rights. Here, however, we are confronted with enforcement officials using their power under the law to compel surrender of private property rights on the basis of an "I know it when I see it" definition. The ambiguity in the definition increases the agency's power at the expense of individual liberty. The danger to those fundamental rights is only heightened by a refusal of the courts to review agency action.

The compliance order requirements displacing the Sacketts from their property distinguishes this case from *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In that case, this Court dismissed the argument that an agency's mere exercise of jurisdiction over property would constitute a taking. *Id.* at 127. Here, however, we have something more than a mere permit

requirement. The property owners have been ordered off of their property – all without any hearing and, according to EPA, without any right to judicial review.

In answer to the complaint that there has been no judicial review of this order to vacate their own property, the court below ruled that judicial review could be had if only the Sacketts would apply for a permit to fill the wetlands (whether or not the property is in fact wetlands) from the Army Corps of Engineers. Once that permit was denied, the Sacketts could then challenge the denial and thereby obtain judicial review of EPA's claim that the property at issue falls within the statutory definition of "waters of the United States."

The plurality opinion in *Rapanos* noted the difficulties in pursuing such a permit. On average, it takes a little more than two years to obtain a final decision from the agency and costs more than a quarter of a million dollars. *Rapanos*, 547 U.S. at 719. Even without the delay, the cost outstrips the total value of the vast majority of single family home lots.

The Ninth Circuit interpreted the statute as authorizing the agency to issue its own mandatory injunction (thus rendering meaningless the provisions of the statute authorizing the agency to seek an injunction from the United States District Court). A property owner who wants judicial review of that injunction has two options. First, the owner can ignore the order—daring the agency to bring the action to court in an attempt to enforce its injunction with civil penalties that can range up to $1 million per month. Then and only then will the property

owner have the opportunity to contest the basis of the order—that placing fill-dirt on the property amounted to the addition of a pollutant to the "waters of the United States." The statute provides that *mere* violation of the compliance order—separate and apart from violation of the Clean Water Act—is grounds for assessment of this crushing penalty. Thus, to obtain judicial review of the mandatory injunction a property owner would need to risk ruinous fines of potentially millions of dollars.[3]

The only other option is to submit to the injunction, vacate the property, and seek a permit from the Army Corps of Engineers. At the conclusion of that two-year process, the property owner could seek review of the agency's determination of whether the property constituted "waters of the United States." In this case, however, we deal with individuals who were seeking to build a home on a residential lot in an area where neighboring properties were already developed. This is not the type of a project that can support a permit process that costs a quarter of a million dollars and takes more than two years to complete. Nonetheless, the Ninth Circuit ruled that this was a sufficient opportunity for judicial review to avoid any violation of the Due Process Clause.

We arrive at this situation because of a steady devaluation of the constitutionally protected individual right to own and use property. Although

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[3] If a property chose to ignore the compliance order for the time it took to obtain a final determination from the Army Corps of Engineers on a permit, the potential total fine would exceed $25 million.

specifically mentioned in the Takings Clause of the Fifth Amendment and Due Process Clauses of the Fifth and Fourteenth Amendments, individual rights in property have steadily been eroded to the point that no constitutional violation is seen in regulations that require individuals to obtain "permission" to use their property. *Riverside Bayview*, 474 U.S. at 127. Indeed, a delayed hearing is not seen as a problem for purposes of the Due Process Clause where "*only* property rights are involved." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 (1974) (emphasis added, citation omitted). Those conclusions are only possible if one ignores the original meaning of the protections in the Constitution for the individual right to own and use property.

One of the founding principles of this nation was the view that respect for property is synonymous with personal liberty. In 1768, the editor of the Boston Gazette wrote: "Liberty and Property are not only join'd in common discourse, but are in their own natures so nearly ally'd, that we cannot be said to possess the one without the enjoyment of the other." Editor, BOSTON GAZETTE, Feb. 22, 1768, at 1. This widespread association of liberty and property, particularly fueled by the availability of land, grew from the background and influence of English law and philosophy.

The Magna Carta of 1215 included the first safeguard of rights from infringement by the monarch. James W. Ely, Jr., *Is Property the Cornerstone of Liberty?*, Lecture at Conference on Property Rights at the Alexander Hamilton Institute for the Study of Western Civilization (Apr. 30, 2009), at 1, *available at* http://www.theahi.org/storage/Is%

20Property%20the%20Cornerstone%20of%20Liberty-March%2011.doc (last visited Mar. 23, 2011). Article 39 of the Magna Carta provided, "No freeman shall be . . . disseised . . . except by the lawful judgment of his peers or by the law of the land." Magna Carta, 1215, Article 39, *available at* http://www.constitution.org/eng/magnacar.htm (last visited March 23, 2011). In his 1765 Commentaries on English Law William Blackstone expounded on the application of the Magna Carta and defined private property rights as both sacred and inviolable. It was the "absolute right, inherent in every Englishman . . . which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." William Blackstone, 1 *Commentaries on the Laws of England* 135 (Univ. of Chicago Press 1979) (1765).

In the late seventeenth century, a wave of English political philosophers responded to the Stuart crowns' trespasses by developing theories of property rights. Ely, Lecture, *supra*, at 2. John Locke, the foremost of these influential thinkers, taught that the right to own private property was natural and in fact preceded the state's political authority. Locke's 1690 *Two Treatises of Government* suggested that rights in property were inseparable from liberty in general, and that the only purpose of government was to protect property and all of its aspects and rights. James W. Ely, Jr., *Property Rights: The Guardian of Every Other Right: A Constitutional History of Property Rights* 17 (1997). "The great and chief end therefore, of Men's uniting into Commonwealths, and putting themselves under Government, is the preservation of Property." John Locke, *Two Treatises of Government*

380 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690).

"Lockean" thinking helped to weaken claims of absolute monarchy in England and profoundly influenced 18th century Whigs. Their political and philosophical posture shifted to stress the rights of property owners as the bulwark of freedom from arbitrary government. Ely, *Property Rights*, *supra*, at 17. Property ownership was identified with the preservation of political liberty.

Whig political thought and Blackstone's commentaries were widely studied and shaped public attitudes in colonial America, where property and liberty were inseparable. The Revolution, prompted by England's constant violation of property and commerce, is evidence of the depth of the Founder's commitment to the belief that rights in property could not be separated from political liberty. As Arthur Lee of Virginia declared in his revolutionary 1775 publication, "The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty". Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain*, *in* PRESENT DISPUTE WITH AMERICA 14 (4th ed. 1775).

In 1776, the Declaration of Independence solidified this tie between political liberty and private property. In drafting the Declaration, Thomas Jefferson did not distinguish property from other natural rights, remaining consistent with Whig philosophy and borrowing heavily from John Locke. Ely, *Property Rights*, *supra*, at 17. Locke described the natural rights that government was formed to protect as "life, liberty, and estates." Jefferson

substituted "pursuit of happiness" for "estates," but this should not be misunderstood as any de-emphasis of property rights. Instead, the acquisition of property and the pursuit of happiness were so closely transposed that the founding generation found the naming of either one sufficient to invoke both. Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 193 (1980).

"Liberty and Property" became the first motto of the revolutionary movement. Ely, *Property Rights*, *supra*, at 25. The new Americans emphasized the centrality and importance of the right to property in constitutional thought. Protection of property ownership was integral in formation of the constitutional limits on governmental authority. *Id.* at 26. As English policies continued to threaten colonial economic interests, they strengthened the philosophical link between property ownership and the enjoyment of political liberty in American's eyes. Adams, *supra*, at 193.

The widespread availability of land did not alter the view that rights in property could not be overcome by a simple public desire. Instead, it strengthened the view that property was central to the new American social and political order. *Id.* Early State constitutions explicitly reflected this fundamental principle in their language. New Hampshire's 1783 Constitution was one of four to declare that "All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting property; and, in a word,

of seeking and obtaining happiness." N.H. Const. pt. 1, art. 2.

Revolutionary dialogue and publications emphasized the interdependence between liberty and property. In 1795, Alexander Hamilton wrote: "Adieu to the security of property adieu to the security of liberty. Nothing is then safe, all our favorite notions of national and constitutional rights vanish." Alexander Hamilton, *The Defense of the Funding System*, *in* 19 THE PAPERS OF ALEXANDER HAMILTON 47 (Harold C. Syrett ed., 1973). When the delegates to the Philadelphia convention gathered in 1787, they echoed this Lockean philosophy. Delegate John Rutledge of South Carolina, for instance, argued that "Property was certainly the principal object of Society." 1 *The Records of the Federal Convention of 1787* 534 (Max Farrand ed., Yale Univ. Press rev. ed. 1937).

The order in which James Wilson listed the natural rights of individuals in his 1790 writing is telling—property came unapologetically first: "I am first to show, that a man has a natural right to his property, to his character, to liberty, and to safety." James Wilson, 2 *Collected Works of James Wilson* ch. 12 (Kermit L. Hall & Mark David Hall eds., 2007). Also in 1790, John Adams proclaimed "Property must be secured, or liberty cannot exist." John Adams, *Discourses on Davila*, *in* 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851).

In the minds of the Founders, property ownership was so closely associated with liberty that property rights were considered indispensible. The language of the Bill of Rights sharply underscores

the Founders' understanding of the close tie between property rights and other personal liberties. It is of great significance that the Fifth Amendment contains key provisions safeguarding property as well as key procedural protections protecting other individual rights. This arrangement shows that the drafters saw no real distinction between individual liberty and property rights. Ely, Lecture, *supra*, at 5.

The founding generation believed that all that which liberty encompassed was described and protected by their property rights. Noah Webster explained in 1787: "Let the people have property and they will have power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of many other privileges." Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* 58-61 (Oct. 10, 1787). From the beginnings of our country, and always in the minds of the Founders, these rights stood or fell together. Ely, Lecture, *supra*, at 5.

These rights and values were enshrined in the Constitution—the Due Process Clause specifically forbids a deprivation of property without "due process of law." As a practical matter, however, the Ninth Circuit has authorized in this case what amounts to a permanent deprivation of property with no opportunity for judicial review. Review by this Court is necessary to preserve the Due Process protections for individual rights in property.

CONCLUSION

For more than two centuries, it has been an undoubted premise of our constitutional government that review by the judiciary is available to check actions of the executive that violate either congressional enactment or a provision of the Constitution. This Court has previously quoted Chief Justice Marshall on this precise point:

> It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process ... leaving to [the claimant] no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.

United States v. Nourse, 34 U.S. (9 Pet.) 8, 28-29 (1835) (*quoted in Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995).

EPA seeks to overturn this bedrock principle of our liberty. Amici urge this Court to reverse the decision below and to find that there is no implied preclusion of judicial review of the EPA order.

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

CHANTELL SACKETT AND MICHAEL SACKETT,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. EPA ROUTINELY CIRCUMVENTS TRADITIONAL DUE PROCESS PROTECTIONS BY ISSUING ADMINISTRATIVE ORDERS UNILATERALLY 4

II. EPA'S RELIANCE ON UNILATERAL ORDERS VIOLATES DUE PROCESS. 7

A. EPA's Administrative Orders Are So Highly Coercive That They Leave Recipients No Real Choice But To Comply. 8

B. The Effect Of EPA's Orders Is Similar To Liens, Which Require Pre-issuance Process. 14

C. There Is No Justification For Deferring Review, Especially In Non-emergency Situations 17

III. THE UNILATERAL ORDER SCHEME IS AN ABERRATION AMONG ADMINISTRATIVE LAW STATUTES 19

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Barry v. Barchi,
443 U.S. 55 (1979) 18

Connecticut v. Doehr,
501 U.S. 1 (1991) 14, 15, 18

Ex Parte Young,
209 U.S. 123 (1908) 4, 8, 11, 12

Fuentes v. Shevin,
407 U.S. 67 (1972) 7, 10, 17

Gen. Elec. Co. v. Jackson,
595 F. Supp. 2d 8 (D.D.C. 2009) 6, 9, 10, 11, 16

Gen. Elec. Co. v. Jackson,
610 F.3d 110 (D.C. Cir. 2010) 5

Gen. Elec. Co. v. Jackson,
No. 10-871 (S. Ct. filed Dec. 29, 2010) 7

Hodel v. Va. Surface Mining & Reclamation Ass'n,
452 U.S. 264 (1981) 15, 23

Hodge v. Muscatine County,
196 U.S. 276 (1905) 14

Honda Motor Co. v. Oberg,
512 U.S. 415 (1994) 19

In re Duplan Corp.,
212 F.3d 144 (2d Cir. 2000) 5

Mitchell v. W.T. Grant Co.,
416 U.S. 600 (1974) 14

N. Ga. Finishing, Inc. v. Di-Chem, Inc.,
419 U.S. 601 (1975) 18

Peralta v. Heights Med. Ctr., Inc.,
485 U.S. 80 (1988) 14

Rapanos v. United States,
547 U.S. 715 (2006) 12

Reardon v. United States,
947 F.2d 1509 (1st Cir. 1991) (en banc) 15, 16

Reisman v. Caplin,
375 U.S. 440 (1964) 13

TVA v. Whitman,
336 F.3d 1236 (11th Cir. 2003) 5, 15

United States v. 408 Peyton Road SW,
162 F.3d 644 (11th Cir. 1998) (en banc) 15

United States v. James Daniel Good Real Prop.,
510 U.S. 43 (1993) 18

STATUTES

5 U.S.C. § 552 21

28 U.S.C. § 2462 ..... 9, 10

33 U.S.C. § 1319 ..... 5, 9, 13

33 U.S.C. § 1344 13

42 U.S.C. § 9607 9

Atomic Energy Act,
42 U.S.C. §§ 2011 *et seq.* 21

Clean Air Act,
42 U.S.C. §§ 7401 *et seq.* 5, 25

Commodity Futures Trading Commission Act,
7 U.S.C. §§ 1 *et seq.* 22

Comprehensive Environmental Response,
Compensation, and Liability Act,
42 U.S.C. §§ 9601 *et seq.* 5

Consumer Product Safety Act,
15 U.S.C. §§ 2051-2089 20

Emergency Planning and Community Right-to-
Know Act, 42 U.S.C. § 11045 5

Federal Aviation Act,
49 U.S.C. §§ 40101 *et seq.* 22-23

Federal Insecticide, Fungicide and
Rodenticide Act,
7 U.S.C. §§ 136-136y 24

Federal Trade Commission Act,
15 U.S.C. §§ 41-58 20

Occupational Safety and Health Act,
29 U.S.C. §§ 651-678 20

Resource Conservation and Recovery Act, 42
U.S.C. §§ 6934, 6973 5

Securities Exchange Act of 1934,
15 U.S.C. §§ 78a *et seq.* 21-22

Surface Mining Control and
Reclamation Act,
30 U.S.C. §§ 1201-1328 23

Toxic Substances Control Act,
15 U.S.C. §§ 2601-2692 24

OTHER AUTHORITIES

33 C.F.R. § 326.3 13

40 C.F.R. § 19.4 9

EPA, OSWER Directive No. 9833.0-1a, Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions (Mar. 7, 1990), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/cerc106-uao-rpt.pdf (last visited Sept. 29, 2011) 6

United States General Accounting Office, *Superfund Program Management* (Feb. 1997), *available at* http://www.gao.gov/ archive/1997/hr97014.pdf (last visited Sept. 29, 2011) 11-12

INTEREST OF *AMICUS CURIAE*[1]

Founded in 1912, the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. More than 96% of the Chamber's members are small businesses with 100 or fewer employees. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

This case is especially important to the Chamber because of the Environmental Protection Agency's ("EPA's") longstanding pattern and practice of circumventing traditional enforcement mechanisms by issuing extraordinarily coercive administrative orders without due process of law. EPA's tactics are particularly remarkable in this case, which involves a couple's desire to build a home on their residential plot. But as thousands of businesses have learned the hard way, this is par for the course with EPA.

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[1] The parties have consented to the filing of this brief in letters filed herewith. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Administrative law is full of flexible procedures that constitutionally balance the government's need for flexibility with private citizens' right to due process, including the right to a hearing before a neutral decisionmaker before or promptly after any deprivation occurs. EPA routinely uses none of those procedures. Instead, it issues administrative orders that adjudicate liability, require costly actions, and impose severe penalties for non-compliance, without providing *any* due process rights at the administrative level. And if the recipient of such an order challenges it, EPA takes the position that the recipient is not entitled to any judicial review until EPA eventually files an action in court several years later, following the accrual of massive and highly coercive penalties. It is easy enough to understand the allure of such a unilateral regime to EPA, because the agency can impose its will without according even the most basic due process protection—the right to a timely hearing before a neutral decisionmaker. But that is exactly what makes this regime so unconstitutional.

I. This is a problem of staggering proportions. Unable to resist the temptation to bypass traditional remedies, EPA issues numerous unilateral orders every day, in routine, non-exigent circumstances. And it does so under a wide variety of environmental statutes for the very purpose of evading the need to prove its case before a neutral decisionmaker.

II. This practice leaves recipients with no realistic choice but to comply with its orders. Non-

compliance subjects a recipient to penalties up to *$37,500 per day*, approaching a total of *$70 million* if EPA waits five years to bring suit, as is its statutory right. No matter how wrong an administrative order may be, individuals, families, and small businesses simply cannot risk bankruptcy as the price of seeking judicial review.

Even large businesses that might be able to pay up to $70 million for a day in court cannot realistically risk the full consequences of non-compliance. An order immediately adjudicates the company legally culpable and recalcitrant if it opts not to comply. It reduces the company's stock value and credit rating, which increases the company's cost of capital. It constrains the company's ability to dispose of the relevant real property, and impairs the company's relationships with stakeholders and its ability to recruit employees.

Practical experience has therefore confirmed that even the most sophisticated parties choose to incur enormous compliance costs instead of run the risks of non-compliance. The very few individuals or companies that have refused to comply with EPA's orders so as to seek their day in court are the exceptions that prove the rule—those that could not afford to comply and therefore had to take their chances, or that perhaps miscalculated by pursuing a course no rational business could justify.

Denial of prompt judicial review of EPA's orders therefore violates due process. This Court has long held that deferral of judicial review is unconstitutional where, as here, it is accompanied by penalties "so enormous . . . as to intimidate" a party

from "resorting to the courts to test [an order's] validity" before complying with it. *Ex Parte Young*, 209 U.S. 123, 147 (1908). That is clearly the case here. Moreover, this Court has stressed that liens, attachments, and other similar encumbrances on property warrant immediate due process protection. EPA's administrative orders have the same effects as such encumbrances by impairing a recipient's use of the property, potentially destroying the property's value, and limiting its alienability.

III. Precisely because EPA's unilateral orders violate the most basic due process rights, they are an aberration in administrative law. Numerous administrative law schemes provide process before, or at least immediately after, an agency issues a similar order. Far from dismantling the administrative state, providing timely due process here would merely bring EPA's administrative-order schemes into line with the procedures applicable to numerous other agencies—agencies whose health-and-safety missions are no less important or pressing than EPA's.

ARGUMENT

I. EPA ROUTINELY CIRCUMVENTS TRADITIONAL DUE PROCESS PROTECTIONS BY ISSUING ADMINISTRATIVE ORDERS UNILATERALLY.

Unfortunately, EPA's use of administrative orders is not limited to the Sacketts. It is not even limited to the Clean Water Act ("CWA" or "Act"). EPA eschews traditional remedies and instead issues unilateral administrative orders under numerous environmental statutes. It does so as a matter of course—not only in emergency situations

where traditional due process protections might be viewed as impractical, but in routine cases where such protections are integral to our constitutional structure. And internal EPA documents show that EPA does so for the very purpose of coercing companies and individuals into surrendering their right to judicial review of EPA's unilateral actions.

The CWA gives EPA multiple options. Among other things, if "the Administrator finds that any person is in violation" of the Act, he or she may "bring a civil action" or "issue an order requiring [the violator] to comply." 33 U.S.C. § 1319(a)(3). EPA has similar alternatives under many other environmental statutes, such as the Clean Air Act, *see, e.g.*, 42 U.S.C. § 7413(a)(3)(B), (a)(3)(C); the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*; the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6934, 6973; and the Emergency Planning and Community Right-to-Know Act, *see* 42 U.S.C. § 11045(a).

The allure of acting unilaterally has been too strong for EPA to resist. In disputes arising under all of those statutes, EPA has repeatedly chosen to issue unilateral orders rather than prove its case before a neutral decisionmaker. *See, e.g.*, *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 113 (D.C. Cir. 2010); *TVA v. Whitman*, 336 F.3d 1236, 1241 (11th Cir. 2003); *In re Duplan Corp.*, 212 F.3d 144, 155-56 (2d Cir. 2000). To some extent, that is to be expected absent judicial intervention—of course an agency would prefer to act unilaterally than to have to prove its case before a neutral decisionmaker. But the

sheer scope, and abusive nature, of EPA's efforts to bypass traditional remedies are startling.

As the Sacketts have explained, EPA's "accomplishments" include issuing up to 3,000 orders annually under the CWA—nearly 60 per week. Pet. 13-14 & n.11. As another example, EPA has formalized a CERCLA enforcement policy under which it "typically will compel private-party response through unilateral orders." EPA, OSWER Directive No. 9833.0-1a, Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions, 3 (Mar. 7, 1990), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/cerc106-uao-rpt.pdf (last visited Sept. 29, 2011).

Indeed, EPA no longer goes to court to seek clean-up orders under CERCLA. Instead, it has issued over 1,700 aptly named Unilateral Administrative Orders ("UAOs") to more than 5,400 companies—averaging "approximately six UAOs to nineteen [companies] every *month*." *Gen. Elec. Co. v. Jackson*, 595 F. Supp. 2d 8, 33 (D.D.C. 2009). When there is an actual emergency, EPA will not issue a unilateral order; instead, it will clean up a site and then seek compensation from responsible parties. *Id.* at 32. That makes the inversion of normal due process principles all the more remarkable—EPA circumvents traditional remedies in favor of unilateral orders only when there is no emergency, and thus no excuse for departing from traditional due process protections.

And EPA does so for the very purpose of coercing recipients into surrendering their due process rights.

In a recent lawsuit between the General Electric Company ("GE") and EPA over this issue, a district court allowed GE to take discovery. Internal documents that EPA was forced to produce reveal that EPA actually trains its personnel to make the terms of unilateral orders "ugly, onerous, and tough" and "very unpleasant," in order to coerce settlements. Pet. Br. 8, *Gen. Elec. Co. v. Jackson*, No. 10-871 (S. Ct. filed Dec. 29, 2010) (internal citations omitted). EPA's internal documents further confirm that EPA seeks to threaten recipients with games of "Russian Roulette," so as to further coerce their entry into "'voluntary' decrees." *Id.* (internal citations omitted).

EPA may well believe that its tactics are an appropriate and effective way of dealing with people and companies that *it* believes to have violated the law. But that is exactly why the Due Process Clause does not leave the choice to the agency. *See Fuentes v. Shevin*, 407 U.S. 67, 90 & n.22 (1972).

II. EPA'S RELIANCE ON UNILATERAL ORDERS VIOLATES DUE PROCESS.

EPA's issuance of unilateral orders without pre-issuance or even prompt post-issuance process is a violation of due process. The essence of due process is the right to notice and an opportunity to be heard by a neutral decisionmaker before, or at the very least immediately after, a deprivation. *See Fuentes*, 407 U.S. at 80, 90-91. The Ninth Circuit held that prompt process is unnecessary here because a recipient that declines to comply with an administrative order can receive judicial review years later, at a time of EPA's choosing, after

enormous statutory penalties have accrued. *See* Pet. App. A-14–A-15. That was wrong.

A. EPA's Administrative Orders Are So Highly Coercive That They Leave Recipients No Real Choice But To Comply.

EPA's administrative order scheme violates due process because the penalties for violation of an order are "so enormous . . . as to intimidate" recipients from "resorting to the courts to test [an order's] validity" before complying with it. *Ex Parte Young*, 209 U.S. at 147. If EPA continues to insist on issuing administrative orders without providing any pre-issuance opportunity for a hearing before a neutral decisionmaker, the courts must, at the very least, provide prompt, post-issuance process.

1. It bears emphasis that EPA's orders are orders, not merely complaints that initiate adjudicatory proceedings in which enforcement and process might later be had. The self-styled "COMPLIANCE ORDER" in this case, for example, states no fewer than 24 times that it is an "Order." Pet. App. G-1–G-7.

The order—which emphasizes that it is "effective on the date it is signed," reports EPA's "FINDINGS AND CONCLUSIONS," including findings and conclusions that the Sacketts' alleged discharges "constitute[] a violation of" the CWA. Pet. App. G-1, G-3. Based on those findings, the order states that the Sacketts are "hereby ORDERED" to, among other things, remove "all unauthorized fill material," provide photographic proof of compliance, and grant EPA access to the site and to all relevant documents. Pet. App. G-4–G-5, G-6. To top it all off, the order

threatens the Sacketts with civil penalties up to $32,500 per day, administrative penalties up to $11,000 per day, or injunctive relief if they do not comply with the order. Pet. App. G-7.

2. Under such orders, massive penalties accrue before any opportunity for a hearing before a neutral decisionmaker. EPA issues its orders without affording any process, such as a hearing before an Administrative Law Judge. And a party that does not immediately comply faces penalties of up to $37,500 *per day*, again before receiving any process. *See* 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4 (adjusting statutory penalty for inflation).

Penalties can approach $70 million when EPA waits the full five years to bring suit against the recipient. *See* 28 U.S.C. § 2462. And under some of these related statutory schemes, EPA may even seek punitive damages. *See* 42 U.S.C. § 9607(c)(3). This is, quite simply, regulation by sledgehammer.

The concrete consequences of EPA's routine issuance of thousands of such orders in non-emergency situations cannot be overstated. The threat of tens of millions of dollars in penalties is overwhelming to individuals, families, and small businesses with no capacity whatsoever to absorb such losses. Failing to comply would require them to risk everything as the price for exercising their constitutional right to judicial review. As a district court found in a related case, non-compliance can literally drive companies out of business, imposing the corporate equivalent of the death penalty. *See Gen. Elec.*, 595 F. Supp. 2d at 30. A family's solvency, and a company's existence, are surely

weightier due process interests than the toasters in their kitchens or lunch rooms, which cannot be reclaimed without far more timely process. *Cf. Fuentes*, 407 U.S. at 89-90.

Even for large companies that might otherwise be willing to risk severe monetary penalties in exchange for a day in court, administrative orders impose additional, immediate, and irreparable harms. In the CERCLA context, for example, a district court found that a company's failure to comply with an administrative order causes it to suffer market impacts on its stock price, brand value, and cost of financing. *See Gen. Elec.*, 595 F. Supp. 2d at 27, 30. Those impacts are significant—on average, compliance costs $3 million but non-compliance causes an immediate decrease in market value approaching $76 million, as well as a significant increase in financing costs. *See id.* at 30; *see also id.* at 22. Non-compliance has a further, real-world impact on a company's ability to hire and its relationships with stakeholders, as it is publicly branded as a recalcitrant actor. *See id.* at 22. Worse, those impacts can plague a company for years as the government rests on its laurels while waiting to sue—leaving the company with no hearing before a neutral decisionmaker until EPA chooses to bring suit many years later. *See* 28 U.S.C. § 2462.

The proof is in the pudding because even the most sophisticated litigants routinely spend enormous amounts of money to comply with unilateral orders rather than waiting to challenge them in courts. Experience amassed over the last three decades has shown that only about 3.5%

percent of all recipients of CERCLA administrative orders did not fully comply to EPA's satisfaction. *See Gen. Elec.*, 595 F. Supp. 2d at 28. Because most of those instances apparently involved attempted compliance rejected by EPA, only a bare handful have ever chosen to risk the consequences of non-compliance.

For that reason, courts have played little role in overseeing EPA's orders. Decisions articulating or applying the legal standards governing EPA's issuance of such orders and the imposition of penalties are relatively few and far between precisely because recipients cannot risk the consequences of non-compliance, and thus cannot exercise their constitutional right to judicial review.

The few individuals or companies that have elected to seek judicial review are isolated exceptions that prove the rule—they either lacked the resources to comply with an order and were therefore forced to take their chances, or perhaps miscalculated and served as a cautionary tale for others. For all but the truly desperate or reckless, non-compliance is only an illusory option, available in theory, but not a meaningful path to judicial review in practice. The "result is the same as if the law in terms prohibited the [party] from seeking judicial [review]" at all. *Ex Parte Young*, 209 U.S. at 147.

The costs of compliance underscore that reality. For example, recipients of CERCLA orders have spent billions of dollars in response costs over the past thirty years. *See* United States General Accounting Office, *Superfund Program Management*, GAO/HR-97-14 at 6 (Feb. 1997), *available at*

http://www.gao.gov/archive/1997/hr97014.pdf (last visited Sept. 29, 2011). The fact that all but a handful of the thousands of unilateral order recipients have chosen to pay those substantial costs of compliance instead of challenging EPA's orders in court is irrefutable evidence that the coercion is real.

3. In the end, therefore, the court of appeals erred by treating the *theoretical* possibility of judicial review as dispositive. *Ex Parte Young* explicitly called for courts to look not to possibilities in the abstract, but to concrete "result[s]." 209 U.S. at 147.

The Ninth Circuit overlooked the reality of the situation by stating that recipients could eventually challenge EPA's issuance of an order by not complying, waiting for EPA to eventually bring an enforcement action in court, and then putting EPA to the test. Pet. App. A-12, A-14–A-15. As the experience discussed above reflects, that "remedy" is inadequate for at least two reasons: it is untimely in light of the severe penalties and other consequences of non-compliance discussed above, and it is extremely uncertain. Whether a court will eventually decide that the recipient of a unilateral order actually violated the relevant environmental statute is difficult to predict. That is especially true in cases like this, where the definition of federal "wetlands" has proven to be difficult at best to determine. *See, e.g.*, *Rapanos v. United States*, 547 U.S. 715, 721-22 (2006) (plurality op.); *see also id.* at 759 (Kennedy, J., concurring in the judgment).

Moreover, there is no statutory good-faith defense to penalties. Congress specified that every violator

"*shall* be subject to a civil penalty . . . ." 33 U.S.C. § 1319(d) (emphasis added). Nor does the courts' discretion over the *amount* of penalties ameliorate the problem. If anything, the courts' open-ended discretion to weigh numerous factors in assessing penalties only adds to their unpredictability: "In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." *Id.*; *cf. Reisman v. Caplin*, 375 U.S. 440, 446-50 (1964) (contemplating less vague "good faith" defense). The resulting uncertainty makes the risk of seeking judicial review too great, even for those who are confident in their position.

The Ninth Circuit further erred by stating that "the CWA has a permitting provision" that allows administrative order recipients to request a permit and immediately appeal its denial. Pet. App. A-13 (citing 33 U.S.C. § 1344(a)). That puts the cart before the horse because EPA generally considers "[a]fter-the-fact permit applications" only "[f]ollowing the completion of any required initial corrective measures[.]" 33 C.F.R. § 326.3(e)(1). Immediate appealability of a permit denial is worthless if the permit application never advances beyond square one. And as the Sacketts explain, the permitting process "is ruinously expensive" in any event. Pet. Br. 30.

B. The Effect Of EPA's Orders Is Similar To Liens, Which Require Pre-issuance Process.

The due process violation is confirmed by the fact that EPA's orders have substantially the same effects as liens and other direct encumbrances on property rights—encumbrances that this Court has long recognized as meriting timely due process protection.

1. In *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 85 (1988), for example, this Court held that "state procedures for creating and enforcing . . . liens are subject to the strictures of due process" where a lien's very issuance triggers "serious consequences." The Court explained that even when no execution sale of the property has yet occurred, the very filing of the lien creates "a cloud on [the party's] title," "encumber[s] the property and impair[s] [the party's] ability to mortgage or alienate it." *Id.* at 82, 85. That the "judgment against [the party] and the ensuing consequences occurred without notice . . . and . . . an opportunity to be heard" amounted to a due process violation. *Id.* at 86 (emphasis added); *see also Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 604 (1974); *Hodge v. Muscatine County*, 196 U.S. 276, 281 (1905).

In *Connecticut v. Doehr*, 501 U.S. 1 (1991), this Court extended that holding about liens to encompass all similar encumbrances on property: "temporary or partial impairments to property rights that attachments, liens, *and similar encumbrances* entail are sufficient to merit due process protection." *Id.* at 12 (emphasis added). Acknowledging that pre-judgment attachment did "not amount to a complete,

physical, or permanent deprivation of real property" and had an impact "less than the perhaps temporary total deprivation of household goods or wages," this Court nonetheless cautioned that due process protections are not confined to such "extreme" deprivations. *Id.*; *see also Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 298-300 (1981) (immediate cessation order halting surface mining operations was cognizable deprivation of property); *Whitman*, 336 F.3d at 1258-59 (administrative compliance order was more than "merely a complaint-like instrument with no legal significance" and violated due process); *United States v. 408 Peyton Road SW*, 162 F.3d 644, 650-51 (11th Cir. 1998) (en banc) (arrest and seizure warrants for property, even absent physical seizure, were cognizable deprivations of property); *Reardon v. United States*, 947 F.2d 1509, 1523 (1st Cir. 1991) (en banc) (CERCLA lien, even absent a final liability determination, was cognizable due process deprivation).

The *Doehr* Court relied on the significant "consequences" of the challenged act: "attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause." *Id.* at 11-12; *see also id.* at 27-28 (Rehnquist, J., concurring in part and concurring in the judgment) (quoting same language in agreeing that due process protections were triggered despite owner's "undisturbed possession" of property). For due process purposes,

therefore, the question is whether a challenged action has impacts sufficiently "similar" to those of liens or attachments. *See Reardon*, 947 F.2d at 1518 (CERCLA lien "amounts to deprivation of a 'significant property interest'" because it "has *substantially the same effect . . . as the attachment* had on the plaintiff in *Doehr*—clouding title, limiting alienability, affecting current and potential mortgages." (emphasis added)).

2. Like a lien or attachment, a unilateral order does not deprive the recipient of the physical use or possession of its property, but its impact on the affected property is nonetheless immediate and palpable: the order impairs the company's right to dispose of the property by limiting alienability. It deters potential buyers and mortgage lenders by leaving them uncertain as to the extent of the ultimate liability. Even beyond the specific property or operation implicated, the order reduces the company's stock value and credit rating. *See Gen. Elec.*, 595 F. Supp. 2d at 23, 28. Moreover, the imposition "may be in place for a considerable time without an opportunity for a hearing," since the statute of limitations throws the judicial determination "so far into the future as to render it inadequate." *Reardon*, 947 F.2d at 1519-20.

The order at issue here confirms that reality. It requires the Sacketts to make physical changes to their land that deprive it of any economic value, and to allow EPA officials to "access" their land and "move freely" about it. Pet. App. G-4–G-5. Underscoring the practical constraints on alienability, the order requires the Sacketts to provide an advance copy of its contents to any

potential purchaser before transferring any interest in the land. Pet. App. G-6.

The burdens imposed by such orders on ordinary property owners such as the Sacketts are plainly so draconian as to divest them of any quiet enjoyment of their property. The burdens on small and large businesses are just as onerous. In the modern economy, impairing businesses' capacity to enter into the financial markets and to secure equity and debt financing dramatically undercuts their provision of goods and services, hiring, and critical investments in business upgrades and research and development.

C. There Is No Justification For Deferring Review, Especially In Non-emergency Situations.

There is especially little justification for deferring due process so far down the road. The court of appeals held that the "goal of enabling swift corrective action would be defeated by permitting immediate judicial review of compliance orders." Pet. App. A-8. But that is simply another way of saying that coercing parties to comply is more efficient than providing them with timely process. As this Court has noted, "it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right." *Fuentes*, 407 U.S. at 90 & n.22.

So long as review is eventually available, there is no justification for allowing EPA, in its sole discretion, to defer it for years, even in routine, non-emergency situations. The type of hearing would presumably be the same; only the timing would be

different. "From an administrative standpoint it makes little difference whether that hearing is held before or after the [deprivation]." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 59 (1993); *see also Doehr*, 501 U.S. at 16.

Thus, this Court has emphasized that deferral of process can be justified only by a need for very prompt action, and that the permissible *length* of the deferral is necessarily limited by that justification as well. *See Barry v. Barchi*, 443 U.S. 55, 66 (1979); *see also N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1975). There is no exigency in issuing an administrative order in the vast majority of cases, including this one. Indeed, in this very case, EPA has repeatedly issued amendments and extensions to the time limits in its orders, making clear that there is no exigency precluding timely due process. *See* Pet. App. H-1–H-3, I-1–I-3.

The only reason that postponing process could benefit the government is that administrative order recipients might avail themselves of timely process, but not of delayed and untimely process. That only underscores the coerciveness of this scheme, and the violation of basic due process rights. The fact that timely process would be useful to administrative order recipients is hardly a reason for denying it. Providing prompt, timely process not only permits private citizens to seek redress, it also deters government abuses from occurring in the first place.

III. THE UNILATERAL ORDER SCHEME IS AN ABERRATION AMONG ADMINISTRATIVE LAW STATUTES.

Precisely because it deviates from the fundamental due process principles discussed above, EPA's unilateral order scheme also departs from other administrative-law regimes. EPA's administrative orders are so coercive, and their consequences so dire, that one would expect *heightened* procedures to apply to their issuance. Yet EPA routinely issues them with significantly *less* process than other agencies use in circumstances implicating far less weighty private interests and far greater exigencies.

Other comparable regulatory schemes afford recipients of adjudicatory orders either a prior hearing before a neutral decisionmaker or a prompt opportunity for independent review after the order is issued. Holding EPA to that bedrock constitutional requirement would hardly bring the modern administrative state to its knees. Instead, it would bring EPA's aberrational scheme in line with the procedures already adhered to by many other agencies. *Cf. Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) (abrogation of protections regularly afforded by other regulatory statutes "raises a presumption that its procedures violate the Due Process Clause").

1. Most administrative law statutes provide process *before* an agency issues an order or takes some other action. That is so even when the private interests are less weighty and there is a more pronounced governmental urgency than here. The

Consumer Product Safety Act, 15 U.S.C. §§ 2051-2089, for example, requires the Consumer Product Safety Commission to file a district court action against an "imminently hazardous consumer product" and its manufacturer, distributor, or retailer, where the product presents an "imminent and unreasonable risk of death, serious illness, or severe personal injury." *Id.* § 2061(a). Notwithstanding the grave hazards posed by the product, Congress still requires the CPSC to bring an action in an Article III court before halting the manufacture or distribution of the product. *See id.* §§ 2061(a), (b).

In similar fashion, the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678, requires the Secretary of Labor to petition a federal district court if it seeks to "restrain any conditions or practices in any place of employment." *Id.* § 662(a). Again, the statute requires such judicial process even where the underlying violations can reasonably be expected to "cause death or serious physical harm immediately." *Id.*

In regulatory schemes that do not involve a pronounced interest in speed, as here, prior process is even more common. For instance, under the Federal Trade Commission Act, 15 U.S.C. §§ 41-58, the Federal Trade Commission may bring suit in federal district court to seek an injunction where a person "is violating, or is about to violate, any provision of law enforced by the [Commission]" and an injunction "would be in the interest of the public." *Id.* § 53(b).

2. In *true* emergencies readily distinguishable from the circumstances in which EPA routinely employs administrative orders, administrative law statutes typically provide, at a minimum, for prompt post-issuance process. The Atomic Energy Act, 42 U.S.C. §§ 2011 *et seq.*, authorizes the Secretary of Energy to issue orders to "prohibit the dissemination" of sensitive information related to nuclear weapons and atomic energy in light of the critical governmental interests in secrecy concerning nuclear weapons and energy and the prevention of nuclear proliferation. *Id.* § 2168(a)(2). The Secretary may issue such orders where "dissemination of such information could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of (A) illegal production of nuclear weapons, or (B) theft, diversion, or sabotage of nuclear materials, equipment, or facilities." *Id.* But anyone affected by such an order may seek immediate judicial review. *See id.* § 2168(d) (citing 5 U.S.C. § 552(a)(4)(B)). Even in this near-doomsday scenario, the statutory regime provides for immediate review.

Similarly, the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*, authorizes the Securities and Exchange Commission summarily to take action to restore order to financial markets and ensure proper settlement of transactions in emergencies—namely, "major market disturbance[s]" such as "sudden and excessive fluctuations of securities prices generally" or major disruption to "the functioning of securities markets." *Id.* §§ 78*l*(k)(2),

(7)(A). Even in these emergency situations, however, the Act provides for expeditious review in a United States Court of Appeals. *See id.* § 78y(a).

The Commodity Futures Trading Commission Act, 7 U.S.C. §§ 1 *et seq.*, likewise allows unilateral action in emergencies but permits immediate judicial review. The Act authorizes the Commodity Futures Trading Commission "to direct" certain parties to set "temporary emergency margin levels on any futures contract" when the Commission "has reason to believe that an emergency exists." *Id.* § 12a(9). But it also permits an affected party to seek review immediately before a United States Court of Appeals. *See id.*

3. Another category of administrative law statutes provides dual tracks for emergency and non-emergency situations. Those statutes reflect Congress's understanding that the degree and timing of due process protection is appropriately tethered to the degree of underlying exigency.

Under the Federal Aviation Act, 49 U.S.C. §§ 40101 *et seq.*, the Administrator of the Federal Aviation Administration may suspend or revoke an operating license for purposes of safety or otherwise to protect the public interest. *Id.* § 44709(b). Notice and "an opportunity to answer" are mandated, "[e]xcept in an emergency." *Id.* § 44709(c). In an emergency, the Administrator's order becomes effective immediately, *see id.* § 44709(e)(2), but the affected party may immediately submit a petition for review by the National Transportation Safety Board ("NTSB"), *see id.* § 44709(e)(3). The NTSB must

review and decide the petition no more than *five days* after it is filed. *See id.*

The Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328, employs a similar dual scheme. In non-emergency situations, the Secretary of the Interior, who has authority to investigate violations, must "issue a notice to the permittee" and "provid[e] opportunity for public hearing." *Id.* § 1271(a)(3). By contrast, in emergency situations involving "imminent danger to the health or safety of the public" or "imminent environmental harm," the Secretary has authority to issue a cessation order without providing pre-deprivation process. *Id.* § 1271(a)(2). The adversely affected party, however, may immediately seek relief from the order, and the Secretary must respond to the request within five days. *See id.* § 1275(c). If unsuccessful, the affected party may then seek an adjudicatory hearing followed by judicial review. *See id.* § 1276. Because the "mine operators are afforded prompt and adequate post-deprivation administrative hearings and an opportunity for judicial review," these emergency cessation orders provide adequate due process. *Hodel*, 452 U.S. at 303.

4. Against that broader background of administrative practice, EPA's administrative order scheme is an outlier. To be sure, EPA itself uses unilateral orders to such an extent as to make the practice routine in the enforcement of many environmental statutes. *See* pp. 4-7, *supra*. But EPA's widespread pattern and practice of issuing onerous administrative orders without timely due process protections does not make it constitutionally

palatable; it only underscores the need for judicial review.

Under other statutory provisions, moreover, EPA enforces the environmental laws without wielding such extraordinary and effectively unchecked authority. For example, the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692, requires the EPA Administrator to commence a civil action in federal district court in order to seize an "imminently hazardous chemical substance" or obtain relief against persons who manufacture, process, distribute, or use such substances, even though there is a far greater exigency there than here. *Id.* § 2606.

The Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y, distinguishes between "imminent hazard" situations and "emergency" situations. *Id.* § 136d(c). If the EPA Administrator determines that suspension of a pesticide registration is necessary to prevent an "imminent hazard," he or she must notify the registrant prior to any suspension so the registrant has an opportunity to seek an administrative hearing as to whether an "imminent hazard" in fact exists. *Id.* § 136d(c)(1). Any hearing, moreover, must take place within five days of the request for that hearing. *See id.* § 136d(c)(2). Any final order following an expedited hearing is then subject to immediate judicial review in district court. *See id.* § 136d(c)(4). If, on the other hand, the EPA Administrator determines that an "emergency" prevents a pre-suspension administrative hearing, the suspension is immediately reviewable by a district court. *Id.* § 136d(c)(3)-(4).

Meanwhile, the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, allows the EPA Administrator to issue "emergency orders" where "necessary to protect public health or welfare or the environment" without filing a civil action in federal court, as it would in an ordinary abatement action. *Id.* § 7603. But even these emergency orders can remain in effect for "not more than 60 days," unless the EPA Administrator brings an action in federal court to seek an extension. *Id.* If nothing else, that provision confirms that Congress did not view timely judicial review as being inconsistent with EPA's legitimate environmental mission.

CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Petitioners,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND LISA P. JACKSON, ADMINISTRATOR,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Prompt Judicial Review Is Necessary In Light Of Uncertainty About The Validity Of The Agencies' Exercise Of Jurisdiction Under The CWA 3

A. Rather than Clarify the Scope of the Agencies' Jurisdiction, the Recent EPA and Corps Guidance Documents Attempt To Extend the CWA's Jurisdictional Reach 5

B. Congress Is Unlikely To Resolve the Uncertainty Regarding the Limits of the CWA. 13

II. Judicial Oversight Of Compliance Orders Will Be Effectively Unavailable If Parties Cannot Promptly Seek Review. 15

A. A Civil Action Brought by EPA Is Not an Adequate Substitute for Prompt Judicial Review of a Compliance Order. 15

B. The Permitting Process Does Not Provide an Adequate Avenue by Which To Seek Review 18

III. The Clean Water Act Does Not Foreclose Judicial Review of Compliance Orders. 22

A. A Strong Presumption of Reviewability Favors Allowing Challenges to Compliance Orders. 23

B. Congress Did Not Override the Presumption that EPA Compliance Orders Are Subject to Judicial Review. 25

C. The Statute Should Be Read To Avoid the Serious Due Process Concerns Associated with Preclusion of Nonstatutory Review. 29

CONCLUSION 31

TABLE OF AUTHORITIES

Page(s)

CASES

Abbott Labs. v. Gardner, 387 U.S. 136 (1967) 17, 23, 27

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Block v. Cmty. Nutrition Inst., 467 U.S. 340 (1984) 23

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Dickerson v. Adm'r, EPA, 834 F.2d 974 (11th Cir. 1987) 26

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Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 29, 30

Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs, 543 F.3d 586 (9th Cir. 2008) 20, 22

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) 1, 18

Gen. Elec. Co. v. Jackson, 610 F.3d 110 (D.C. Cir. 2010), *cert. denied* 131 S. Ct. 2959 (2011) 26

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James Madison Ltd. v. Ludwig, 82 F.3d 1085 (D.C. Cir. 1996) 28

Massachusetts v. EPA, 549 U.S. 497 (2007) 1

Micei Int'l v. Dep't of Commerce, 613 F.3d 1147 (D.C. Cir. 2010) 28

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Rueth v. U.S. EPA, 13 F.3d 227 (7th Cir. 1993) 16, 20

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Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1 (2000) 18, 23

Shields v. Utah Idaho Cent. R.R. Co., 305 U.S. 177 (1938) 23, 24

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United States v. Cundiff, 555 F.3d 200 (6th Cir. 2009) 4, 16

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Wagner Seed Co. v. Daggett, 800 F.2d 310 (2d Cir. 1986) 26

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STATUTES AND LEGISLATIVE MATERIALS

33 U.S.C. §1251 *et seq.* 2, 3

33 U.S.C. §1311 5

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H.R. Rep. No. 79-1980 (1946) 25

Pub. L. No. 100-04, §314(a) (1987) 28

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REGULATIONS AND AGENCY MATERIALS

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68 Fed. Reg. 1991 (Jan. 15, 2003) 11

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INTEREST OF THE *AMICUS CURIAE*

The Competitive Enterprise Institute (CEI) is a nonprofit public interest organization dedicated to advancing the principles of individual liberty and limited government.[1] To those ends, CEI engages in research, education, and advocacy efforts involving a broad range of regulatory and legal issues.

Since the organization's founding in 1984, attorneys on CEI's staff have represented CEI or other groups or individuals before this Court and lower federal courts in numerous matters involving issues of administrative and constitutional law. In recent terms, CEI attorneys have served as co-counsel for the petitioners in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010), and represented amici in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007), and *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007).

CEI staff have published studies of federal wetlands policy and have testified before Congress on the subject. One comprehensive CEI analysis of wetlands policy found that the Clean Water Act's Section 404 permitting program deterred

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[1] The parties have consented to the filing of this brief, which is accompanied by the letters acknowledging their consent. No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the preparation of this brief.

development and imposed heavy regulatory costs while not effectively protecting wetlands. *See* Jonathan Tolman, Swamped: How America Achieved "No Net Loss" 21-22 (April 1997), *available at* http://cei.org/pdf/2302.pdf (last visited Sept. 28, 2011); *see also* Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. 1 (1999).

SUMMARY OF ARGUMENT

The Court should hold that the Clean Water Act (CWA or Act), 33 U.S.C. §1251 *et seq.*, does not preclude judicial review of compliance orders.

Allowing parties like the Sacketts to contest federal jurisdiction over their property would facilitate administration of the Act. The outer limits of federal authority under the CWA are anything but clear. Congress and the responsible federal agencies have not clarified the reach of the Act, and therefore assessments of whether particular wetlands are subject to the Act's requirements remain unpredictable. In light of the prevailing uncertainty, prompt judicial review of compliance orders would provide property owners with an authoritative statement about the Act's applicability to their property, prevent the agencies from exceeding their authority, and help settle outstanding questions about the scope of the Act. The Government contends that review of compliance orders is unnecessary because courts can resolve a jurisdictional dispute if the United States files a civil enforcement suit or if the property owner completes the permitting process, but these alternatives are wholly inadequate.

Nothing in the CWA precludes judicial review of compliance orders. Because reading the statute to foreclose review would raise serious concerns about its constitutionality, the Court should interpret the CWA to allow prompt judicial review.

ARGUMENT

I. Prompt Judicial Review Is Necessary In Light Of Uncertainty About The Validity Of The Agencies' Exercise Of Jurisdiction Under The CWA.

The breadth of federal jurisdiction over wetlands under the Clean Water Act (CWA or Act), 33 U.S.C. §1251 *et seq.*, has been a contentious issue since its enactment in 1972. The Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps), the agencies jointly tasked with administering the statute, have wielded their authority broadly. In recent years, this Court has intervened to curb their overreaching. *See Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159 (2001).

In the five years since *Rapanos*, the EPA and the Corps have published successive, non-binding guidance documents addressing the scope of their jurisdiction under the CWA. These documents have not only failed to bring clarity to the issue, but have also raised concerns that the agencies are once again exceeding the proper scope of their authority. Despite attempts to pass clarifying legislation, Congress has been unable to resolve the uncertainty that currently exists. As a result, even property

owners who are aware of the Act are often uncertain whether their property is subject to its requirements, and even the best-intentioned regulators may exceed the limits of their jurisdiction.

Allowing prompt judicial review of compliance orders will mitigate the negative effects of the prevailing jurisdictional uncertainty. A district court's ruling would give property owners a definitive answer as to whether they need to comply with the Act's requirements. In cases where the court agrees with the agency, property owners may decide to begin their restoration work earlier than they would have in the absence of judicial review, when years may pass before a jurisdictional dispute arrives in court. *See, e.g.*, *United States v. Cundiff*, 555 F.3d 200, 204 (6th Cir. 2009) (noting that the United States filed suit only after "eight years of failed negotiations and ignored orders"). And a district court ruling against the agency would unburden the owners' use of their property.

Prompt judicial review of compliance orders would also facilitate proper administration of the statute by keeping the EPA and the Corps from overstepping the limits of their jurisdiction. And, over time, judicial decisions applying the CWA will help settle the outstanding questions about its scope. As the boundaries of the CWA become more clear, the EPA and the Corps can devote more agency resources to enforcement actions that will be sustained in court and fewer resources on wetlands outside their jurisdiction.

A. Rather than Clarify the Scope of the Agencies' Jurisdiction, the Recent EPA and Corps Guidance Documents Attempt To Extend the CWA's Jurisdictional Reach.

Subject to certain exceptions, the CWA prohibits the discharge of dredged or fill materials into "navigable waters," 33 U.S.C. §1311, which are defined as "the waters of the United States, including the territorial seas," *id.* §1362(7). This language does not by itself suggest that any wetlands are covered by the statute, let alone which ones. *Cf. United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985) ("On a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.'").

While the EPA and the Corps have interpreted the statute's vague language as a broad delegation of authority over wetlands,[2] this Court has not read the CWA's jurisdiction-conferring provisions as

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[2] The agencies' regulations assert that the CWA applies to "interstate wetlands," 33 C.F.R. §328.3(a)(2), and "[w]etlands adjacent to," *id.* §328.3(a)(7), traditional interstate navigable waters, *id.* §328.3(a)(1), interstate waters, *id.* §328.3(a)(2), "other waters" that "could affect interstate or foreign commerce," *id.* §328.3(a)(3), an impoundment or tributary of any of these waters, *id.* §328.3(a)(4), (5), or the territorial seas, *id.* §328.3(a)(6). *See also* 40 C.F.R. §122.2. These regulations reflect the agencies' broad interpretation of the CWA but not the more restrictive reading later adopted by this Court. The regulations are now twenty-five years old, 51 Fed. Reg. 41,250 (Nov. 13, 1986), outdated, and no longer authoritative in light of *SWANCC* and *Rapanos*.

generously. *See Rapanos*, 547 U.S. 715; *SWANCC*, 531 U.S. 159 (holding that the agencies cannot establish jurisdiction over an isolated, intrastate, non-navigable water based solely on the water's use as a habitat by migratory birds that cross state lines). *But see Riverside Bayview Homes*, 474 U.S. at 139 (deferring to the agencies' decision to exercise jurisdiction over wetlands that directly abut a navigable-in-fact waterway).

Most recently, in *Rapanos*, the Court considered the CWA's applicability to wetlands that did not contain, and were not adjacent to, waters that are navigable in fact. The Court's plurality (joined by four Justices) concluded that establishing federal jurisdiction over such wetlands "requires two findings." 547 U.S. at 742 (plurality opinion by Justice Scalia). First, the wetlands must be adjacent to a channel that contains "a relatively permanent body of water connected to traditional interstate navigable waters." *Id.* Second, the wetlands must have "a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.*

A concurring opinion concluded that jurisdiction would exist if "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780 (Kennedy, J., concurring in the judgment). Under this standard, the federal agencies can establish jurisdiction by showing that wetlands are adjacent to tributaries that are navigable in fact or, for wetlands adjacent to non-navigable tributaries, by

demonstrating "on a case-by-case basis" a "significant nexus" between the wetlands and a traditional navigable water. *Id.* at 782.

In a separate concurrence, the Chief Justice lamented that, without an opinion for the Court "on precisely how to read Congress' limits on the reach of the Clean Water Act," "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis." *Id.* at 758 (Roberts, C.J., concurring). Three Justices suggested that the EPA and the Corps clarify the scope of their jurisdiction under the CWA through notice-and-comment rulemaking. *See id.* at 757-58; *id.* at 780-81 (Kennedy, J., concurring in the judgment); *id.* at 811 (Breyer, J., dissenting).

Unwilling to undertake such rulemaking, the agencies have instead published a series of controversial guidance documents.[3] These guidance

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[3] New guidance or draft guidance documents were issued in 2007, 2008, and 2011. *See* U.S. Envtl. Prot. Agency & U.S. Army Corps of Eng'rs, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States & Carabell v. United States (June 5, 2007), *available at* http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf (last visited Sept. 28, 2011) [hereinafter 2007 Guidance]; U.S. Envtl. Prot. Agency & U.S. Army Corps of Eng'rs, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States & Carabell v. United States (Dec. 2, 2008), *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/cwa_guide/cwa_juris_2dec08.pdf (last visited Sept. 28, 2011) [hereinafter 2008 Guidance]; U.S. Envtl. Prot. Agency & U.S. Army Corps of Eng'rs, *Draft Guidance on Identifying Waters Protected by the Clean Water Act*, (May 2, 2011), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_g (continued...)

documents have endorsed a case-by-case approach that renders jurisdictional determinations more discretionary and less predictable. The lack of binding regulations has also left the scope of the agencies' jurisdiction more likely to change with the political tides.

Perhaps most significantly, all of the guidance documents permit the agencies to improperly aggregate many non-contiguous wetlands when applying the "significant nexus" test.[4] In one case, the Corps relied on the 2007 and 2008 guidance documents to establish CWA jurisdiction over 4.8 acres of wetlands that lie approximately seven miles from the nearest traditional navigable water. *See Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278 (4th Cir. 2011).[5] The Corps concluded that it had jurisdiction because, in its view, the 4.8 acres of wetlands at issue were "similarly situated" to all

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uidance_4-2011.pdf (last visited Sept. 28, 2011) [hereinafter 2011 Guidance]; *see also* 76 Fed. Reg. 24,479 (May 2, 2011).

[4] The 2007 and 2008 guidance documents instructed field staff that they should assert jurisdiction over a tributary and all of its adjacent wetlands if "it is determined that [the] tributary and its adjacent wetlands collectively have a significant nexus with traditional navigable waters." 2007 Guidance at 9; 2008 Guidance at 10.

[5] This patch of wetlands sits adjacent to (but does not directly abut) a 2,500-foot manmade drainage ditch, which flows from February through April into another perennial drainage ditch 900 feet away, which runs into a larger tributary about 3,000 feet away, which eventually flows, after approximately three to four miles, into a traditional navigable water. *See Precon*, 633 F.3d at 282.

448 acres of non-contiguous wetlands adjacent to a three-mile network of tributaries, and the 448 acres of wetlands, in combination, significantly affected the traditional navigable water. *See id.* at 283-86, 290-93.

The Fourth Circuit required the agency to reassess its significant nexus determination on remand. *See id.* at 293-97. The court upheld the Corps' decision to aggregate the 448 acres of wetlands, but stated that "the Corps' record on this point gives us a bare minimum of persuasive reasoning to which we might defer," *id.* at 292, and "urge[d] the Corps to consider ways to assemble more concrete evidence of similarity before again aggregating such a broad swath of wetlands," *id.* at 293.

Rather than heed the Fourth Circuit's advice, the Corps and the EPA proposed new guidance that would allow field staff to aggregate not only wetlands but also tributaries on an even grander scale. Under the proposed guidance issued in May 2011, all tributaries or wetlands in a watershed will be found to have a "significant nexus" if a single tributary or wetland significantly affects a traditional navigable water, or if two or more tributaries or wetlands in combination have a significant effect. 2011 Guidance at 9-10.

Under the agencies' new approach to aggregation, the ecological nature of any particular wetlands and their proximity to the traditional navigable water become largely irrelevant. The agencies will frequently be able to avoid analyzing a particular tributary or wetlands based on a presumption that those waters are "similarly

situated" with other wetlands or waters in the same watershed.[6] As the EPA has acknowledged, this approach allows the agencies to vastly expand their jurisdiction based on minimal fact-finding. Significant nexus determinations will be "less time-consuming" under the revised aggregation approach because of the larger watershed scale and because the agency can rely on prior "significant nexus" determinations, rather than needing to conduct a new analysis.[7]

In addition to the new aggregation standards, several other policy shifts in the new guidance also expand the agencies' regulatory authority. First, the 2011 Guidance reasserts the agencies' jurisdiction over so-called "other waters"—waters that are

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[6] This presumption is unwarranted in light of the vast size of many watersheds. A relatively small "HUC-10" watershed might be as large as a quarter-million acres, 2011 Guidance at 8, and the large Mississippi River Drainage Basin "drains 41 percent of the 48 contiguous states" and "covers more than 1,245,000 square miles," U.S. Army Corps of Engineers, The Mississippi River and Tributaries Project (May 19, 2004), http://www.mvn.usace.army.mil/pao/bro/misstrib.htm (last visited Sept. 28, 2011). *Cf. Norton Constr. Co. v. U.S. Army Corps of Eng'rs*, 280 Fed. App'x 490, 493 (6th Cir. 2008) (unpublished) (describing the Muskingum Watershed, which "encompasses 18 counties in Ohio"). There is no basis to presume, for example, that all tributaries in the Mississippi River Drainage Basin have a "significant nexus" to the river simply because one tributary has such a nexus.

[7] U.S. Envtl. Prot. Agency, Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction 10 (April 27, 2011) [hereinafter EPA Cost-Benefit Analysis].

isolated, intrastate, and not navigable. 2011 Guidance at 19-20, 32-33. Previous guidance had explained that federal jurisdiction over "other waters" was "uncertain[] after *SWANCC*" and instructed field staff that they "should seek formal project-specific Headquarters approval prior to asserting jurisdiction over such waters." 68 Fed. Reg. 1991, 1996 (Jan. 15, 2003).

Second, the 2011 Guidance would allow the agencies to designate more waters as "traditionally navigable" than they could under the previous guidance.[8] This in turn would allow the agencies to exercise jurisdiction over their adjacent wetlands without establishing a significant nexus and to claim even more wetlands as significantly affecting traditional navigable waters. Their jurisdiction would grow from "waters of the United States" to "moistures of the United States."

Third, the proposed guidance gives the agencies broader discretion to delineate the upstream boundaries of tributaries and to designate them "navigable" or "relatively permanent."[9] This

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[8] The proposed guidance makes it easier for the agencies to prove that a water is susceptible to use in commercial navigation, explaining only that the agency's finding "should be supported by some evidence." 2011 Guidance at 6. The 2008 Guidance required that susceptibility to commercial navigation be "clearly documented" by, for example, "development plans, plans for water dependent events, etc." 2008 Guidance at 5 n.20.

[9] The 2011 Guidance abandons the 2008 Guidance's definition of a "tributary" as "the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower (continued...)

change, too, brings more wetlands within the agencies' reach.

The EPA and the Corps announced that "under th[eir] proposed guidance the number of waters identified as protected by the [CWA] will increase compared to current practice." 76 Fed. Reg. 24,479, 24,479 (May 2, 2011). All told, the EPA estimates that the 2011 Guidance would extend federal jurisdiction to cover 17% of intrastate waters that are isolated and non-navigable. EPA Cost-Benefit Analysis at 7, 28-29. Additionally, while the Corps found that it lacked jurisdiction over 1.5% of the non-isolated wetlands and 2% of the streams it analyzed under the 2008 Guidance in fiscal year 2009-2010, the EPA assumes that the proposed guidance would render all of these waters (803 acres of wetlands and 9.3 miles of stream) subject to the CWA. *See id.* at 6-7.

The EPA and the Corps have recognized the need for more certainty at the edges of their

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order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream)." 2008 Guidance at 6 n.24. It likewise omits the previous guidance documents' assertion that "relatively permanent" waters must "have continuous flow at least seasonally (e.g., typically three months)," 2008 Guidance at 1; *see* 2011 Guidance at 13. Third, the 2011 Guidance explains that tributaries that might otherwise be "classified as perennial, intermittent and ephemeral," may instead be "described as dynamic zones within stream networks." 2011 Guidance at 13. Further, the 2011 Guidance announces that the agencies "generally expect" to assert CWA jurisdiction over any tributary that is "part of a tributary system" to a jurisdictional water. *Id.* at 13-14.

jurisdiction, but their new guidance fails to provide clearer direction to field staff or to reduce uncertainty among landowners. Indeed, stakeholders from across the policy spectrum have encouraged the agencies to initiate a rulemaking to clarify the Act's scope.[10] The guidance binds no one, and the field staff who determine whether to assert jurisdiction have a greater degree of discretion than they had previously.

B. Congress Is Unlikely To Resolve the Uncertainty Regarding the Limits of the CWA.

Members of Congress have taken note of the recent uncertainty surrounding CWA jurisdiction, S. Rep. No. 111-361, at 4, 6, 7 (2010), which has now been the subject of multiple congressional hearings. *See Hearing on Status of the Nation's Waters,*

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[10] *See, e.g.*, Comments of National Wildlife Federation et al. at 65 (July 31, 2011) ("[A] revised regulation would establish a binding rule that would provide . . . greater certainty and consistency in jurisdictional determinations for landowners, agency field staff, and the courts."); Comments of National Association of Clean Water Agencies at 1 (July 29, 2011) ("[T]he issue of CWA jurisdiction deserves the full attention of the rulemaking process and the formal notice and comment procedures that go with it."); Comments of Agricultural Retailers Association et al. at 5, 9-20 (July 29, 2011) [hereinafter Industry Comments] ("Continuing to address and readdress this fundamentally important issue through guidance . . . does a disservice to all."). Industry groups also raised numerous concerns about the breadth of the authority claimed by the agencies in the 2011 Guidance. *See* Industry Comments. (All comments are available online at http://www.regulations.gov.)

Including Wetlands, Under the Jurisdiction of the Federal Water Pollution Control Act: Hearing Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (2007); SWANCC *Supreme Court Decision: Impact on Wetlands Regulations: Hearing Before the Subcomm. on Fisheries, Wildlife, and Water of the S. Comm. on Environment and Public Works*, 108th Cong. (2003).

In each of the last four Congresses, Members have introduced legislation that would clarify the statute's reach by overriding *SWANCC* (and, more recently, *Rapanos*). *See* Clean Water Authority Restoration Act of 2003, S. 473, 108th Cong.; Clean Water Authority Restoration Act of 2005, H.R. 1356, 109th Cong.; Clean Water Restoration Act of 2007, H.R. 2421, 110th Cong.; Clean Water Restoration Act, S. 787, 111th Cong. (2009). This legislation would answer questions about the scope of the statute, but courts, agencies, and landowners would still be left to grapple with questions about the constitutional limits of federal regulation.

On the other hand, the current House of Representatives has passed a bill that would deny the Corps funds "to develop, adopt, implement, administer, or enforce a change or supplement to" the 1986 regulations defining "waters of the United States" or the 2003 and 2008 guidance documents implementing *SWANCC* and *Rapanos*. An Act Making Appropriations for Energy and Water Development and Related Agencies for the Fiscal Year Ending September 30, 2012, and for Other Purposes, H.R. 2354, 112th Cong. §108 (as passed by the House of Representatives, July 15, 2011). Rather than promote certainty in the area of wetlands

regulation, this bill would prevent the EPA and the Corps from promulgating regulations to clarify the outer bounds of the CWA.

* * *

The extent of federal authority over wetlands remains unclear five years after *Rapanos*. Prompt judicial review will mitigate the uncertainty facing landowners and will help to ensure that EPA and Corps assertions of jurisdiction do not exceed statutory bounds.

II. Judicial Oversight Of Compliance Orders Will Be Effectively Unavailable If Parties Cannot Promptly Seek Review.

The Government contends that there is no need for property owners who receive an EPA compliance order to obtain prompt judicial review because they could challenge the EPA's jurisdiction in another proceeding. But the alternatives suggested by the Government are inadequate and, in certain circumstances, unavailable. As a result, for property owners like the Sacketts, a suit for declaratory and injunctive relief provides the only meaningful opportunity to test the agencies' assertion of jurisdiction over their property.

A. A Civil Action Brought by EPA Is Not an Adequate Substitute for Prompt Judicial Review of a Compliance Order.

The Government asserts that review of compliance orders is unnecessary because a property owner can challenge the EPA's jurisdiction if and when the EPA brings an enforcement action. But the

possibility of contesting the EPA's jurisdiction in an enforcement action does not provide an adequate substitute for prompt judicial review.

An enforcement action is not a sufficient means for permitting judicial review because the penalties for disobeying a compliance order are sufficiently severe that many individuals will obey an order of doubtful validity rather than risk substantial fines and even imprisonment. For example, if a year elapsed between the compliance order and the commencement of a civil action by the United States, the Sacketts would have already accumulated potential fines of $11 million in addition to the costs of complying with any injunctive relief.[11] In the meantime, they might suffer collateral consequences of the EPA's outstanding order. *Cf. Rueth v. U.S. EPA*, 13 F.3d 227, 230 (7th Cir. 1993) (Recipients of compliance orders may "encounter some problems, such as securing bank loans or obtaining title insurance."). For these reasons, property owners like the Sacketts might well decide to comply with an order that they disagree with because defying the order creates risks that they are

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[11] At the time the Sacketts received the EPA's order, failure to comply subjected them to civil penalties of up to $32,500 per day or administrative penalties of up to $11,000 per day. *See* 33 U.S.C. §1319(d); 40 C.F.R. §19.4. The maximum fines have since increased to $37,500 and $16,00 per day, respectively. *See* 40 C.F.R. §19.4. And the Government is able to increase the cost of non-compliance by waiting long periods before filing suit. *Cf. Cundiff*, 555 F.3d at 204 (noting that the United States filed suit only after "eight years of failed negotiations and ignored orders").

unwilling to assume. Of course, when a property owner decides to comply with an order, there will likely be no enforcement action, and thus no opportunity to challenge EPA's jurisdiction.

The Government contends that the threat of substantial fines is an insufficient basis for permitting prompt judicial review because such a suit would be a "pre-enforcement" challenge to a compliance order, which the CWA does not permit. This characterization of the Sacketts' suit, though adopted by lower courts, is mistaken. The paradigmatic pre-enforcement action challenges a statute or rule of general applicability before the agency has applied it to the particular plaintiff. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 139 & n.1 (1967) (defining a "pre-enforcement" action as "a suit brought by one before any attempted enforcement of the statute or regulation against him").[12] Here, by contrast, the agency has made detailed findings that the Sacketts are in violation of the CWA, ordered costly remedial action, and left the Sacketts exposed to a substantial fine that escalates daily.

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[12] In the CWA context, a true pre-enforcement challenge might attack new Corps' regulations as substantively or procedurally flawed, or a new guidance document as having been improperly adopted without notice and comment. *See, e.g., P & V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021 (D.C. Cir. 2008) (holding that the plaintiff's challenge to the definition of "waters of the United States" in the Corps' 1986 regulations was untimely because the agency had not reopened the rulemaking with its 2003 Advance Notice of Proposed Rulemaking).

In the absence of immediate judicial review, the plaintiffs face a classic Hobson's choice: Do nothing and risk severe punishment, or comply and acquiesce to an agency order that they believe to be unlawful. Given the extraordinarily high costs of waiting for the United States to file a civil suit, "[d]elayed review . . . may mean no review at all," *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 47 (2000) (Thomas, J., dissenting). *Cf. Free Enter. Fund*, 130 S. Ct. at 3150-51 (explaining that a plaintiff lacks "a 'meaningful' avenue of relief' if it must "*incur* a sanction (such as a sizable fine)" in order to challenge an agency action in court, where it will face "severe punishment should its challenge fail").

B. The Permitting Process Does Not Provide an Adequate Avenue by Which To Seek Review.

The Government has suggested that the CWA's permitting process offers parties like the Sacketts an alternative route to judicial review and that the Sacketts could have avoided exposing themselves to sanctions "by applying for a permit and then seeking review of the permitting decision under the APA." Brief for the Respondents in Opposition to the Petition for Writ of Certiorari at 10. This was not an option for the Sacketts once they received the compliance order and will not be a realistic option for others who do not believe that their property is subject to the CWA.

The primary problem with the Government's suggestion that landowners request a permit if they want to contest federal jurisdiction is that many will

not have the slightest idea that their land is subject to federal permitting requirements. Given the persistently unclear and constantly shifting scope of the federal agencies' jurisdiction, many landowners will not know of the Corps' and EPA's position that they need a permit until it is too late.

For landowners like the Sacketts who begin landscaping without first obtaining a wetlands fill permit, the permitting process will often be unavailable. Corps regulations allow property owners who have already violated the CWA to file "after-the-fact permit applications," but only after they complete any "initial corrective measures" required by agency order. 33 C.F.R. §326.3(e)(1). Even so, the Corps and the EPA typically reserve the right to pursue further enforcement actions against property owners who undertake the required corrective measures. *See id.* §326.3(d)(1) (retaining "the Government's options to initiate appropriate legal action" in all but certain "unusual cases"). And if the Corps determines that further legal action is appropriate or if another federal, state, or local agency initiates enforcement proceedings, the Corps will not accept the property owners' permit application until the litigation has concluded. *See id.* §326.3(e)(1)(ii), (iv). Thus, the permitting process is typically unavailable to someone who has unwittingly violated the agencies' interpretation of the CWA.

Even when the permitting process is available, it is not an adequate substitute for prompt judicial review. Although a property owner may request a jurisdictional determination (JD) from the Corps as an initial step toward applying for a permit, several

courts have held that JDs are not themselves reviewable.[13] As a result, a property owner who disputes the Corps' jurisdiction must complete the entire permitting process before seeking review.[14] This is so regardless of whether the property owner would rather abandon the planned project altogether than incur the costs of mitigation and other permit conditions. It would be anomalous—and indeed the height of inefficiency—to require an individual to go through the time and expense to secure a permit that he or she believes is not required.[15]

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[13] *See Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586 (9th Cir. 2008); *Greater Gulfport Prop., LLC v. U.S. Army Corps of Eng'rs*, 194 Fed. App'x 250 (5th Cir. 2006) (unpublished); *Comm'rs of Pub. Works of Charleston v. United States*, 30 F.3d 129 (4th Cir. 1994) (unpublished); *cf. Rueth v. EPA*, 13 F.3d 227 (7th Cir. 1993) (declining to allow the recipient of a compliance order to contest the agency's determination that it has jurisdiction without challenging the order itself).

[14] *See, e.g., Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278 (4th Cir. 2011) (permit applicant contested Corps jurisdiction in challenging permit denial); *Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs*, 425 F.3d 1150 (9th Cir. 2005) (resolving jurisdictional challenge brought by developer who obtained conditional permit and reserved the right to contest jurisdiction).

[15] Moreover, JDs would not provide a good substitute for prompt judicial review because requesting a JD from the Corps is costly and time-consuming. Even JD requests submitted by small-property owners (whom one Corps district describes as "'mom and pop' applicants") are required to include a U.S. Geological Survey Quadrangle map showing the footprint of the site, a surveyed property boundary plan, and photographs keyed to the survey plan. *See* U.S. Army Corps of Engineers, (continued...)

The Corps encourages property owners to reduce the costs and delays associated with obtaining a JD by requesting only a "preliminary JD." Preliminary JDs are "advisory" and "non-binding" "indications that there may be waters of the United States" on a parcel or "indications of the approximate location(s)" of those waters, JD Guidance at 3, rather than the Corps' "official" determination that it has jurisdiction, *id.* at 1. The cost of requesting a preliminary JD, however, is waiver of the right to challenge the Corps' jurisdiction. *See id.* at 4. So a property owner who wants to contest the applicability of the CWA in court must endure the more cumbersome process.

Philadelphia District, Jurisdictional Determinations (Aug. 10, 2000), http://www.nap.usace.army.mil/cenap-op/regulatory/jd.htm (last visited Sept. 28, 2011). "Mom and pop landowners are [therefore] encouraged to reduce their application processing time by electing to use environmental consultants to delineate their properties," *id.*—not an insubstantial burden for property owners who "are typically interested in constructing a single family home or other structure on a small parcel of land (one acre or less)," *id.*

Obtaining a final JD can also be time-consuming. The Corps' stated goal is for its district engineers to complete every JD within 60 days of the request, U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 08-02, Jurisdictional Determinations at 4 (June 26, 2008), *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/rgls/rgl08-02.pdf (last visited Sept. 28, 2011) [hereinafter JD Guidance], but this window does not include the time for administrative appeals, which may take up to a year, 33 C.F.R. §331.8.

Even apart from the jurisdictional determination, the Corps' permitting process is onerous to property owners who do become aware of the risk that their property is subject to the CWA before they begin their landscaping. "The permitting process can be arduous and expensive, and may result in the Corps' refusal to issue a permit, frustrating property owners' plans to develop their land." *Nat'l Ass'n of Home Builders v. EPA*, 731 F. Supp. 2d 50, 52 (D.D.C. 2010) (internal citations omitted); *see also Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 596 (9th Cir. 2008) ("[N]avigating the CWA permitting process is no small task."). As the *Rapanos* plurality explained, the "average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915 . . . ." 547 U.S. at 721. For larger projects, a developer might spend over two years *preparing to apply* for a permit. *See, e.g., Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936 (9th Cir. 2010) (public developer of a local business park finally applied for a permit in August 2007 after spending February 2005 to February 2006 preparing an environmental impact statement and October to December 2006 consulting with the Fish and Wildlife service).

III. The Clean Water Act Does Not Foreclose Judicial Review of Compliance Orders.

Petitioners have argued compellingly that the Due Process Clause grants the recipient of an EPA compliance order the right to review of that order in district court, but there is no need for the Court to reach the constitutional question. The Court can and

should resolve this case on the narrower ground that the Administrative Procedure Act and the CWA permit individuals like the Sacketts to obtain judicial review of CWA compliance orders.

A. A Strong Presumption of Reviewability Favors Allowing Challenges to Compliance Orders.

The Administrative Procedure Act codified a "basic presumption of judicial review" that can be overcome "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Abbott Labs.*, 387 U.S. at 140-41; *cf. Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984) (Congressional intent to preclude review must be "fairly discernible in the statutory scheme.").

While nonstatutory review of final agency action is presumptively available, the strength of the presumption depends on whether the plaintiff will have other means of obtaining review of the agency's action. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 & n.8 (1994); *Illinois Council*, 529 U.S. at 19-20. "'[T]he strong presumption that Congress did not mean to prohibit all judicial review,'" *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 672 (1986) (quoting *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)), should be given its full force in this case.

Supreme Court precedent antedating the Administrative Procedure Act confirms that compliance orders are the kind of agency action for which judicial review should be presumptively available. In *Shields v. Utah Idaho Central Railroad Co.*, 305 U.S. 177 (1938), the Court held that a

railroad could seek immediate judicial review of the Interstate Commerce Commission's determination that the railroad did not operate an "interurban electric railway" exempt from the Railway Labor Act (RLA). *See id.* at 179, 183. Following the Commission's decision, the Mediation Board ordered the railroad, on penalty of criminal charges, to post the statutorily required notice that labor disputes between the railroad and its employees would be handled under the RLA. *See id.* Because the Commission's decision "has the effect, if validly made, of subjecting the [railroad] to the requirements of the [RLA]," the Court explained, "[t]he nature of the determination points to the propriety of judicial review." *Id.* at 183.

So too here. Once the EPA issued a compliance order asserting jurisdiction over the Sacketts' property, they faced an intolerable choice: Comply with the order or face daily escalating civil penalties and the possibility of criminal prosecution. As in *Shields*, the nature of the agency action at issue "points to the propriety of judicial review," *id.*

The Court's more recent decisions in *Thunder Basin* and *Illinois Council* are not to the contrary. In both cases, the party seeking review of an agency action could have challenged the agency's decision by participating in the administrative process and then asking a court to review the resulting final agency action. *See Thunder Basin*, 510 U.S. 200 (mine operator could seek judicial review of an agency's interpretation of its regulations after imposition of civil penalties and exhaustion of administrative appeals); *Illinois Council*, 529 U.S. 1 (nursing home was entitled to judicial review of regulations

governing termination of Medicare-provider status after termination and an adverse decision in an administrative hearing). Here the administrative process has already come to an end and resulted in the final agency action the Sacketts now challenge.

Under the Government's interpretation of the CWA, review of the compliance order would be available, if at all, only at the whim of the United States. Because preclusion of the Sacketts' current lawsuit would leave them without any opportunity to seek judicial review, the presumption of reviewability should apply in its strongest form.

B. Congress Did Not Override the Presumption that EPA Compliance Orders Are Subject to Judicial Review.

The text of the CWA does not on its face bar judicial review of compliance orders. Indeed, the plain words of the CWA say nothing one way or the other about judicial review of compliance orders. The silence "is certainly no evidence of [congressional] intent to withhold review," *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970) (quoting H.R. Rep. No. 79-1980, at 41 (1946)), and given the presumption of reviewability, should weigh in favor of permitting nonstatutory review of the EPA's order. *Cf. Stark v. Wickard*, 321 U.S. 288, 309 (1944).

The statutory silence here is striking because Congress has expressly foreclosed review of compliance orders in other environmental statutes. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42

U.S.C. §9601 *et seq.*, authorizes the issuance of abatement orders upon a determination "that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." *Id.* §9606(a). The statute strips courts of jurisdiction to review an order under §9606(a) except in specifically enumerated proceedings including an action to enforce an order or to compel a remedial action. *See id.* §9613(h). CERCLA illustrates that Congress will expressly foreclose review of environmental compliance orders when it believes that judicial intervention will not be in the public interest.[16]

The Ninth Circuit, following other lower courts, read the CWA to give the EPA "a choice" between issuing a compliance order "*or*" bringing a civil action in the district court, and concluded that permitting the Sacketts to seek judicial relief from the compliance order would "eliminate this choice" *Sackett v. U.S. EPA*, 622 F.3d 1139, 1143 (9th Cir. 2010). This reasoning does not withstand scrutiny. The Government's argument might have some force

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[16] Unlike CERCLA orders, CWA orders such as the one received by the Sacketts are not premised on a finding of imminent and substantial endangerment, but simply upon a finding that the CWA has been violated. 33 U.S.C. §1319(a). Industry claims that CERCLA's bar of prompt review violates the Due Process Clause have been rejected. *See, e.g.*, *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 127-29 (D.C. Cir. 2010), *cert. denied* 131 S. Ct. 2959 (2011); *Dickerson v. Adm'r, EPA*, 834 F.2d 974, 978 & n.7 (11th Cir. 1987); *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 315-17 (2d Cir. 1986).

if it read the word "or" to make compliance orders and civil actions mutually exclusive. But they aren't. The agency can, and regularly does, avail itself of both options. And to the extent that the statute gives the EPA a "choice" to proceed by compliance order or civil action, the Sacketts' lawsuit does not deprive the agency of that choice. The EPA has already exercised its option to issue a compliance order and still has the option of filing a civil suit.[17]

The Ninth Circuit based its decision to foreclose review in part on the existence of a provision specifically authorizing appeals from administrative penalties, 33 U.S.C. §1319(g)(8). But when Congress expressly provides for judicial review of only some agency actions, it does not generally follow that Congress has precluded review of others. *See Abbott Labs.*, 387 U.S. at 144; *see also* Louis L. Jaffe, *The Right to Judicial Review*, 71 Harv. L. Rev. 769, 771 (1958) ("The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent."). In any event, Congress enacted §1319(g)

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[17] The Government argued below that the statutory preclusion of review "is consistent with the Constitution's vesting of enforcement discretion—including when and how to enforce a statute—with the executive branch" and that "the Sacketts are seeking to compel EPA to exercise its discretionary enforcement authority in a specific manner." Brief of Appellee at 14-15, *Sackett v. U.S. EPA*, 622 F.3d 1139 (9th Cir. 2010). The Ninth Circuit did not address this argument and for good reason: It would cast constitutional doubt on all pre-enforcement review.

fifteen years after the provisions governing compliance orders. *See* Pub. L. No. 100-04, §314(a) (1987). The former can hardly inform the meaning of the latter. Moreover, §1319(g)(8) routes appeals of certain administrative penalties directly to the courts of appeals and imposes a 30-day deadline on all appeals. Express authorization of these appeals was necessary if Congress wanted to override the default rule that agency actions are reviewable in the district court subject to a six-year limitations period. *See Micei Int'l v. Dep't of Commerce*, 613 F.3d 1147, 1151-52 (D.C. Cir. 2010); *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1093-94 (D.C. Cir. 1996). Conversely, Congress could remain silent and expect courts to apply the ordinary rules governing nonstatutory review. The express provision for review of administrative penalties therefore says little about review of compliance orders.

The Ninth Circuit's reliance on the legislative history of a different statute, 622 F.3d at 1144, is even less persuasive. Even if the Congress that enacted the CWA's enforcement provisions modeled them on provisions of the Clean Air Act, the legislative history of the Clean Air Act hardly sheds light on the meaning of the CWA.

In short, the CWA contains no evidence that Congress sought to foreclose nonstatutory review of compliance orders.

C. The Statute Should Be Read To Avoid the Serious Due Process Concerns Associated with Preclusion of Nonstatutory Review.

For the reasons discussed in Petitioners' Brief on the Merits, because of the property rights at stake, serious due process problems would flow from a decision precluding judicial review of compliance orders. In order to avoid the constitutional question, the Court should construe the CWA to preserve the right to judicial review of compliance orders. *See Bowen*, 476 U.S. at 681-82 & n.12; *cf. Ashwander v. TVA*, 297 U.S. 288 (1936).[18]

Ruling that the Due Process Clause requires judicial review of CWA compliance orders would unnecessarily implicate the constitutional validity of other regulatory regimes. Such a decision could, for example, be read to suggest that judicial review of CERCLA compliance orders is likewise mandatory. *See supra*, at 25-26 & n.16. A decision based not on the Constitution but on the text of the CWA would appropriately leave undisturbed the Government's administration of programs authorized by differently worded statutes.

Statutory preclusion of judicial review of CWA compliance orders "would raise serious constitutional problems," *Edward J. DeBartolo Corp. v. Fla. Gulf*

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[18] Although there should be no need to reach the constitutional question, if the Court reaches the issue, it should hold that the Due Process Clause requires that the recipient of an EPA compliance order have the right to judicial review of that order.

Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). The Court should therefore "construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.* Because Congress did not clearly express its intent to foreclose review here, the Sacketts' challenge to EPA's compliance order should be heard on the merits.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND LISA PEREZ JACKSON, ADMINISTRATOR,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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16

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
STATUTORY BACKGROUND	2
A. The Unilateral Order Scheme In The Clean Water Act, Clean Air Act, And CERCLA	2
B. EPA's Exercise Of Its Unilateral Order Authority In Practice	5
C. The Unilateral Order Authority's Outlier Status Among U.S. Regulatory Schemes	8
SUMMARY OF ARGUMENT	10
ARGUMENT	13
I. DUE PROCESS REQUIRES A HEARING PRIOR TO THE EFFECTIVE DATE OF A UNILATERAL ADMINISTRATIVE ORDER	13
A. The Opportunity To Defy An Order Does Not Provide Due Process Because It Still Entails A Deprivation Of Property	15
B. The Coercive Nature Of Such Schemes Violates Due Process Under *Ex parte Young*	18
C. Judicial Discretion Over Damages Does Not Eliminate The Due Process Violation	23
D. At Minimum, Due Process Demands Prompt Judicial Review Of An ACO Or UAO	25

TABLE OF CONTENTS—Continued

Page

II. UNILATERAL ORDERS' DEPARTURE FROM DUE PROCESS INFLICTS SIGNIFICANT ECONOMIC COSTS ON THE NATION WITHOUT ADEQUATE POLITICAL ACCOUNTABILITY 26

CONCLUSION 29

TABLE OF AUTHORITIES

CASES — Page

BE & K Constr. Co. v. NLRB,
536 U.S. 516 (2002) 23

In re Bell Petroleum Servs., Inc.,
3 F.3d 889 (5th Cir. 1993) 29

Burlington N. & Santa Fe Ry. Co. v. United States,
129 S. Ct. 1870 (2009) 13, 28

Calero-Toledo v. Pearson Yacht Leasing Co.,
416 U.S. 663 (1974) 14

Chicago, Milwaukee, & St. Paul Ry. Co. v. Polt,
232 U.S. 165 (1914) 20

Chicago, Milwaukee & St. Paul Ry. Co. v. Kennedy,
232 U.S. 626 (1914) 21

Chicago & N.W. Ry. Co. v. Nye-Schneider-Fowler Co.,
260 U.S. 35 (1922) 23

Cleveland Bd. of Educ. v. Loudermill,
470 U.S. 532 (1985) 13

Connecticut v. Doehr,
501 U.S. 1 (1991) 12, 17, 27, 28

Dolan v. City of Tigard,
512 U.S. 374 (1994) 22

Downum v. United States,
372 U.S. 734 (1963) 24

FCC v. League of Women Voters,
468 U.S. 364 (1984) 22

TABLE OF AUTHORITIES—Continued

Page

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) 14, 18

Frost & Frost Trucking Co. v. R.R. Comm'n, 271 U.S. 583 (1926) 22

Fuentes v. Shevin, 407 U.S. 67 (1972) 14, 28

General Electric Co. v. Johnson, No. Civ. A. 00-2855, 2006 WL 2616187 (D.D.C. Sept. 12, 2006) 4

General Electric Co. v. Jackson, 595 F. Supp. 2d 8 (D.D.C. 2009) ..... *passim*

Hannah v. Larche, 363 U.S. 420 (1960) 25

Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) 24

Legal Serv. Corp. v. Velazquez, 531 U.S. 533 (2001) 22

MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118 (2007) 18

Missouri Pac. Ry. Co. v. Nebraska, 217 U.S. 196 (1910) 20, 21

Missouri Pac. Ry. Co. v. Tucker, 230 U.S. 340 (1913) 21

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 18

TABLE OF AUTHORITIES—Continued

Page

Nollan v. California Coastal Comm'n,
483 U.S. 825 (1987) 22

N. Georgia Finishing v. Di-Chem,
419 U.S. 601 (1975) 28

Pac. Mut. Life Ins. Co. v. Haslip,
499 U.S. 1 (1991) 24

Pickering v. Bd. of Educ.,
391 U.S. 563 (1968) 22

Reardon v. United States,
947 F.2d 1509 (1st Cir. 1991) (en banc)..... 17

S. Pines Assocs. By Goldmeier v. United States,
912 F.2d 713 (4th Cir. 1990) 2

Sherbert v. Verner,
374 U.S. 398 (1963) 22

Sniadach v. Family Fin. Corp.,
395 U.S. 337 (1969) 28

Speiser v. Randall,
357 U.S. 513 (1958) 22

St. Louis, Iron Mountain & S. Ry. Co. v. Williams,
251 U.S. 63 (1919) 21

St. Louis, Iron Mountain & S. Ry. Co. v. Wynne,
224 U.S. 354 (1912) 21

Taylor v. Hayes,
418 U.S. 488 (1974) 24

Tennessee v. Lane,
541 U.S. 509 (2004) 23

TABLE OF AUTHORITIES—Continued

Page

Tennessee Valley Authority v. Whitman,
336 F.3d 1236 (11th Cir. 2003) 14, 15

Thunder Basin Coal Co. v. Reich,
510 U.S. 200 (1994) 18

United States v. An Article of Device "Theramatic,"
715 F.2d 1339 (9th Cir. 1983) 10

United States v. B & D Electric, Inc.,
No. 1:05CV63, 2007 WL 1395468
(E.D. Mo. May 9, 2007) 29

United States v. Burlington N. R.R. Co.,
200 F.3d 679 (10th Cir. 1999) 29

United States v. Capital Tax Corp.,
No. 04-C-4138, 2007 WL 2225900
(N.D. Ill. Aug. 1, 2007) 25

United States v. General Elec. Co.,
No. 06-CV-354-B, 2010 WL 4977478
(D.N.H. Dec. 3, 2010) 4, 25

United States v. James Daniel Good Real Prop.,
510 U.S. 43 (1993) 13, 28

United States v. LeCarreaux,
No. 90-1672, 1992 WL 108816
(D.N.J. Feb. 19, 1992) 25

United States v. Ottati & Goss, Inc.,
900 F.2d 429 (1st Cir. 1990) 28

United States v. Tarkowski,
248 F.3d 596 (7th Cir. 2001) 29

TABLE OF AUTHORITIES—Continued

Page

United States v. Wedzeb Enterprises, Inc., 844 F. Supp. 1328 (S.D. Ind. 1994) 29

W.R. Grace & Co. v. EPA, 261 F.3d 330 (3d Cir. 2001) 9

Wadley S. Ry. Co. v. Georgia, 235 U.S. 651 (1915) 19

Ex parte Young, 209 U.S. 123 (1908) 12, 15, 18, 19, 23

Zinermon v. Burch, 494 U.S. 113 (1990) 14

STATUTES AND REGULATIONS

40 C.F.R. § 19.4 ..... 3, 4, 15, 16

7 U.S.C. § 12a(9) 9

7 U.S.C. § 136d(c) 8, 9

15 U.S.C.

§ 2606 9

§ 2061(a) 10

§ 2061(b) 10

21 U.S.C. § 334(b) 10

28 U.S.C. § 2462 4

29 U.S.C.

§ 662(a) 10

§ 662(b) 10

30 U.S.C.

§ 1271 9

§ 1275(c) 9

§ 1276 9

TABLE OF AUTHORITIES—Continued

	Page
33 U.S.C.	
§ 1319(a)(3)	1, 2, 3
§ 1319(b)	2, 3
§ 1319(d)	3, 16
§ 1319(g)	2
§ 1319(g)(4)(B)	2
§ 1319(g)(8)	2
42 U.S.C.	
§ 2114(b)(1)	8
§ 2168	8
§ 2239	8
§ 300i	9
§ 300j-7(a)(2)	9
§ 7413(a)	2
§ 9604(a)	3
§ 9606(a)	2, 3, 7
§ 9606(b)(1)	*passim*
§ 9606(b)(2)	7, 14
§ 9607(a)	3
§ 9607(c)(3)	*passim*
§ 9611(a)	3
§ 9613	3
§ 9613(g)(2)	4
§ 9613(h)	4
49 U.S.C.	
§ 44709	8
§ 44709(f)	8

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

Page

Stephen Breyer, BREAKING THE VICIOUS CYCLE: TOWARD EFFECTIVE RISK REGULATION (1993) 26

Brief in Opposition of EPA, *Employers Ins. of Wausau v. Browner*, 516 U.S. 1042 (1996), (No. 95-434), 1995 WL 17048207 7

W. Kip Viscusi & James T. Hamilton, *Are Risk Regulators Rational? Evidence from Hazardous Waste Cleanup Decisions*, 89 Amer. Econ. Rev. 1010 (1999) 27

W. Kip Viscusi & James T. Hamilton, CALCULATING RISKS: THE SPATIAL AND POLITICAL DIMENSIONS OF HAZARDOUS WASTE (1999) 27

BRIEF OF GENERAL ELECTRIC CO. AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF *AMICUS CURIAE*

The General Electric Company ("GE") has an important interest in the questions presented by this case.[1] Despite an exemplary safety and environmental record, the size, scope, and nature of GE's business operations mean that the company is subject to numerous administrative orders by the U.S. Environmental Protection Agency ("EPA") requiring GE to undertake costly cleanup actions.

The law at issue at this case, the Clean Water Act ("CWA"), 33 U.S.C. § 1319(a)(3), is one of a handful of environmental statutes that, unlike other regulatory schemes in U.S. administrative law, do not afford a timely and meaningful hearing either prior to or (in cases of emergencies) immediately after the issuance of an administrative order depriving the recipient of property. These outlier statutes authorize EPA to issue administrative orders with the force of law directing parties like GE to undertake expensive and time-consuming cleanup and compliance actions.

Accordingly, this case presents a valuable opportunity for the Court to provide constitutional guidance regarding the fundamental due process principles governing environmental regulatory schemes that authorize agencies to issue unilateral administrative

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[1] This brief is filed with the written consent of the parties, which is on file with the Clerk of Court. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

orders. The Court should make clear that due process requires the government to provide a timely and meaningful hearing *prior to* the effective date of such orders or, in exigent circumstances, as soon as possible afterwards. A right to prompt judicial review of any such order is the minimum that due process demands where (as here) the order was issued without a full and fair administrative hearing.

STATUTORY BACKGROUND

A. The Unilateral Order Scheme In The Clean Water Act, Clean Air Act, And CERCLA

This case involves an administrative compliance order ("ACO") issued by EPA pursuant to the CWA, 33 U.S.C. § 1319(a)(3). EPA possesses similar statutory authority to issue ACOs under the Clean Air Act ("CAA"), 42 U.S.C. § 7413(a), and to issue unilateral administrative orders ("UAOs") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9606(a).

ACOs are one of three principal civil enforcement options for EPA under the CWA. When the EPA identifies a CWA violation, it can: *first*, assess an administrative penalty, 33 U.S.C. § 1319(g), which entitles the alleged violator to "a reasonable opportunity to be heard and to present evidence" and immediate judicial review, *id.* at § 1319(g)(4)(B), (g)(8); *second*, institute a civil enforcement action in federal district court, *id.* at § 1319(b), which also entitles the alleged violator to immediate judicial review; or *third*, issue an ACO, which "is a document served on the violator, setting forth the nature of the violation and specifying a time for compliance with the Act." *S. Pines Assocs. By Goldmeier v. United States*, 912 F.2d 713, 715 (4th Cir. 1990). EPA is authorized to

issue an ACO upon a finding of a CWA violation, "on the basis of any information available to [it]." 33 U.S.C. § 1319(a)(3). To enforce a compliance order, EPA must bring an action in federal court under 33 U.S.C. § 1319(b). The violator is subject to potential court-imposed civil penalties not to exceed $37,500 "per day for each violation" of the compliance order. *Id.* at § 1319(d); 40 C.F.R. § 19.4.[2]

EPA enjoys similar authority under CERCLA. When EPA determines that an environmental cleanup is required at a contaminated site, the agency has three options under CERCLA. *First*, EPA may conduct the cleanup itself and file suit against a Potentially Responsible Party ("PRP") in federal district court to recover the costs of the cleanup. *See* 42 U.S.C. §§ 9604(a), 9607(a), 9611(a), 9613. *Second*, EPA may file an abatement action in federal district court to compel a PRP to conduct a specified response action. *See id.* at § 9606(a). Under either of these two options, a PRP targeted by EPA has the right to a meaningful hearing before a neutral decisionmaker in which it can challenge both EPA's determination that the PRP is liable and EPA's selection of the response action at the site.

But EPA also has a *third* option under CERCLA. It may, without court involvement, issue a UAO directing a PRP to conduct a specified response action. *See id.* at § 9606(a). UAOs are directed to specific parties, contain specific findings of liability,

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[2] At the time the Sacketts' ACO was issued, 40 C.F.R. § 19.4 provided for a maximum daily penalty of $32,500. Assessing such daily penalties on a small residential property like the Sacketts' could easily exceed the value of the property in a very short time period, amounting to a million dollars in less than a month.

and impose new and binding liabilities and legal obligations on those parties. As described by one court:

> UAOs may essentially be viewed as condensed prosecutions and adjudications: they initiate adversary proceedings against a PRP, but simultaneously constitute a statement that the PRP is legally responsible for the violation and require the PRP to remedy wrongs through the fulfillment of certain responsibilities and penalties (*i.e.*, UAOs regulate conduct of PRPs).

General Electric Co. v. Johnson, No. Civ. A. 00-2855 2006 WL 2616187, at *15 n.5 (D.D.C. Sept. 12, 2006).

As with ACOs under the CWA and CAA, UAOs are issued without affording the alleged violator a hearing to challenge EPA's adjudicatory determinations. Instead, the PRP must comply with the UAO on pain of potential treble damages and noncompliance penalties of $37,500 per day. 42 U.S.C. §§ 9606(b)(1), 9607(c)(3); 40 C.F.R. § 19.4. These penalties accumulate until EPA, at its sole discretion, brings an action to enforce its order—a step that can take up to five years, 28 U.S.C. § 2462, and in some cases six, *see* 42 U.S.C. § 9613(g)(2).[3] CERCLA § 113(h) precludes any challenge to a UAO until all of the work required under the UAO has been completed or until EPA brings an enforcement action. 42 U.S.C. § 9613(h).

While CERCLA permits imposition of penalties for violations of a UAO only where the violation (or failure to comply) is "willful[]" and "without sufficient cause," 42 U.S.C. §§ 9606(b)(1), 9607(c)(3), the sheer magnitude of the potential penalties deters PRPs

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[3] *Cf. United States v. General Elec. Co.*, No. 06-CV-354-B, 2010 WL 4977478, at *2 (D.N.H. Dec. 3, 2010) (suit commenced on Sept. 20, 2006 to recover costs incurred since Apr. 30, 1993).

from testing the validity of UAOs in practice. For example, should EPA decide to wait the full five years before bringing an enforcement action, a PRP would be liable for nearly $68.5 million *per violation*, *id.* § 9606(b)(1), with the potential for treble damages, *id.* § 9607(c)(3)—a "bet the company" scenario for small-to-medium size businesses and even for many large ones.

B. EPA's Exercise Of Its Unilateral Order Authority In Practice

The record compiled in *General Electric Co. v. Jackson*, 595 F. Supp. 2d 8 (D.D.C. 2009) ("*GE*"), *aff'd*, 610 F.3d 110 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 2959 (2011), helps to demonstrate the coercive force of UAOs under CERCLA as they operate in practice. Recognizing that UAOs are effectively unreviewable, EPA has abandoned use of judicial abatement actions under CERCLA in favor of issuing UAOs to all PRPs that decline to enter into consent decrees. *Id.* at 32. Given the chance to impose such coercive pressure, EPA prefers to issue UAOs as a matter of course rather than employ other provisions of CERCLA that would provide PRPs with meaningful predeprivation judicial review.[4]

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[4] EPA, Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions 3, OSWER Directive No. 9833.0-1A, (Mar. 7, 1990), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/cerc106-uao-rpt.pdf ("[T]he Agency typically will compel private-party response through unilateral orders," which "should be considered as one of the primary enforcement tools to obtain RD/RA response by PRPs."); EPA, Guidance on CERCLA Section 106 Judicial Actions, OSWER Directive 9835.7 (Feb. 24, 1989) ("The Region should generally issue a Section 106 administrative order before referring a Section 106 civil judicial case.").

EPA issues "approximately six UAOs to nineteen PRPs every *month*." *GE*, 595 F. Supp. 2d at 33. From August 16, 1982 to May 25, 2006, EPA issued over 1,700 UAOs ordering more than 5,400 private recipients to pay an aggregate $5.5 billion for EPA-selected response costs at CERCLA sites. *Id.*; *see* United States General Accounting Office, Superfund Program Management, GAO/HR-97-14 at 6 (Feb. 1997), *available at* http://www.gao.gov/archive/1997/hr97014.pdf. Because of the severe penalties for noncompliance, only a very tiny handful of the 1,700 UAOs issued by EPA have ever been subject to independent review, and even then, only many years after issuance of the order.

EPA is aware of the coercive nature of its power to issue UAOs, recognizing that such authority "is one of the most potent administrative remedies available under any existing environmental statutes." EPA, Guidance Memorandum on Use and Issuance of Administrative Orders Under Section 106(a) of CERCLA 1 (Sept. 8, 1983). EPA exploits the intimidating features of the UAO scheme:

> EPA seeks maximum penalties for non-compliance; EPA seeks multiple penalties for violations at a single UAO site; EPA rejected Justice Department advice that EPA should impose a cap on daily penalties; and EPA labels noncomplying PRPs as "recalcitrant."

GE, 595 F. Supp. 2d at 17-18; *see also id.* at 24 ("EPA does not meaningfully dispute GE's assertion that '[i]t is the government's practice in bringing suit for UAO noncompliance to seek the statutory maximum in penalties and treble damages.'"). Such a threat hangs over the head of any PRP, dropping only "if and when the EPA seeks to enforce the [UAO]." Brief

in Opposition of EPA at 15, *Employers Insurance of Wausau v. Browner*, 516 U.S. 1042 (1996) (No. 95-434), 1995 WL 17048207.

CERCLA gives a UAO recipient that chooses to comply with an unlawful order the opportunity to seek reimbursement of its costs of compliance after EPA certifies that the cleanup is complete, at least in certain circumstances. 42 U.S.C. § 9606(b)(2). In practice, however, very few PRPs have ever been awarded reimbursement of costs, and only after substantial delays. "On average, it takes three years to fully comply with a UAO." *GE*, 595 F. Supp. 2d at 31.

Despite statutory language restricting the issuance of UAOs to situations posing "an imminent and substantial endangerment to the public health or welfare or the environment," 42 U.S.C. § 9606(a), "EPA does not issue UAOs in true emergency situations. In true emergency situations, EPA cleans up a site itself and later files a cost recovery action," in which the PRP is entitled to a hearing in an Article III court. *GE*, 595 F. Supp. 2d at 32. Instead, EPA has authoritatively construed the "imminent and substantial endangerment" language to encompass situations in which "harm may not be realized for years" and other circumstances that may "not necessarily [present] an actual harm." EPA and Department of Justice, Use of CERCLA § 106 to Address Endangerments That May Also Be Addressed Under Other Environmental Statutes 4 (Jan. 18, 2001) (citations omitted). The lack of urgency is illustrated by the fact that there is on average an eight year lag-time between identification of a hazardous waste site and issuance of a UAO and a four year lag-time between remedy selection and UAO issuance. *GE*, 595 F. Supp. 2d at 32.

C. The Unilateral Order Authority's Outlier Status Among U.S. Regulatory Schemes

The environmental statutes providing EPA with such unilateral order authority differ from virtually all other comparable regulatory schemes. A wide variety of statutes, unlike the CWA, CAA, and CERCLA, afford recipients of administrative orders either a prior hearing or a prompt opportunity for independent review after the order is issued. For example:

- The Nuclear Regulatory Commission may issue an order under 42 U.S.C. § 2114(b)(1) in connection with the disposal of radioactive waste "to protect health or to minimize danger to life or property." Such an order is subject to immediate judicial review as a final agency action. *See* 42 U.S.C. § 2239.

- The Atomic Energy Act, 42 U.S.C. § 2168, provides immediate judicial review of orders that "prohibit the dissemination" of sensitive information relating to nuclear weapons.

- The Federal Aviation Act, 49 U.S.C. § 44709, provides that orders revoking operating licenses are immediately appealable to the National Transportation Safety Board, which must dispose of any appeal within 60 days. The Board's decision is then subject to immediate judicial review. *Id.* at § 44709(f).

- The Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136d(c), authorizes EPA to issue emergency orders suspending the registration of a pesticide, which effectively halts its use, on a finding of "imminent hazard." But the recipient has 5 days to request an expedited hearing of the suspension order, during which time the order is held in abey-

ance, and following the hearing the recipient may seek full judicial review of the order. *Id.*

• The Safe Drinking Water Act, 42 U.S.C. § 300i, affords immediate judicial review of emergency orders. *See W.R. Grace & Co. v. EPA*, 261 F.3d 330, 338 (3d Cir. 2001) (citing 42 U.S.C. § 300j-7(a)(2)).

• The Commodity Futures Trading Commission Act, 7 U.S.C. § 12a(9), affords immediate judicial review of emergency orders relating to trading margins.

• The Surface Mining Control and Reclamation Act, 30 U.S.C. § 1275(c), authorizes surface mining permittees adversely affected by administrative orders issued pursuant to 30 U.S.C. § 1271 to apply to the Secretary of Labor for temporary relief pending a full hearing on the validity of the order, and requires the Secretary to respond within five days. A party may then appeal the Secretary's decision to a district court. 30 U.S.C. § 1276.

Other regulatory safety schemes require government agencies to go to the courts in the first instance, affording alleged violators a full and fair hearing prior to the issuance of orders directing remedial and similar actions:

• The Toxic Substances Control Act, 15 U.S.C. § 2606, governing the regulation and registration of chemicals, provides that EPA must commence a civil judicial action against an imminent hazard, seeking temporary and/or permanent relief, either via an order seizing the imminently hazardous chemical substance or other relief against persons distributing such substances.

• The Consumer Product Safety Commission may file an action in district court against an imminently hazardous consumer product, defined as "a consumer product which presents imminent and unreasonable risk of death, serious illness, or severe personal injury." 15 U.S.C. § 2061(a). But there is a full judicial hearing before relief is granted. *Id.* at § 2061(b).

• The Occupational Safety & Health Administration may petition a district court for an injunction "to restrain any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated." 29 U.S.C. § 662(a). Again, there is a full judicial hearing before relief is available. *Id.* at § 662(b).

• The Food & Drug Administration may request the Attorney General to institute seizures and judicial actions against drugs if there is probable cause to believe "that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer." 21 U.S.C. § 334(b). But the aggrieved party is entitled to an immediate judicial trial on the charges. *United States v. An Article of Device "Theramatic,"* 715 F.2d 1339, 1343 (9th Cir. 1983).

SUMMARY OF ARGUMENT

The questions presented by this case have broad implications beyond the parties involved in this dispute. This Court's normally sound practice of resolving cases on the narrowest possible ground would ill serve the interests in fairness, predictability, and public accountability presented in the circumstances

here. Accordingly, this Court should not confine its decision to a statutory interpretation of the particular provision of the CWA invoked by EPA against Petitioners. Instead, the Court should address the fundamental due process concerns raised by EPA's exercise of it unilateral order authority and provide guidance regarding the constitutional principles applicable to such administrative schemes generally.

The ACO and UAO statutory schemes empower EPA, in the absence of any emergency, to single out an individual or business and to order, without any prior hearing, performance of a cleanup requiring years of labor and investment, on pain of severe penalties for refusing. The only opportunity for any hearing occurs after the fact and only at a time of the agency's choosing. Such a scheme violates due process.

This Court should hold that regulatory schemes authorizing the issuance of unilateral, adjudicatory administrative orders require the government to provide due process hearings *prior to* issuing such orders or, in exigent circumstances, promptly afterwards. A right to prompt judicial review of any such order is the least that due process demands when the order has not been preceded by a full and fair administrative hearing.

The Government's primary defense of the ACO and UAO statutory schemes is that the mere issuance of an administrative order does not entail a deprivation of property because administrative orders are allegedly not "self-executing." The Government notes that the recipient is not assessed a civil penalty until EPA subsequently brings an enforcement action in court—even though $37,500 daily penalties begin

running from the effective date of the administrative order.

The Government's argument fails for two reasons. *First*, a party suffers a deprivation of property immediately upon the issuance of an administrative order, even if the statutory scheme contains a "sufficient cause" defense, as in CERCLA. 42 U.S.C. §§ 9606(b)(1), 9607(c)(3). A party choosing to ignore the order and seeking to vindicate its position in a subsequent EPA enforcement action will suffer immediate financial harms, in the form of higher borrowing costs, a lower stock price, and other impacts cognizable as deprivations of property under this Court's decision in *Connecticut v. Doehr*, 501 U.S. 1 (1991).

Second, the coercive impact of the staggering financial penalties available to EPA in an enforcement action makes the decision whether to comply a Hobson's choice. Compliance incurs immediate and substantial costs. But defying an administrative order and waiting for EPA to bring an enforcement action in which an order might be tested in court imposes grave financial risks. The ACO and UAO statutory schemes therefore violate the holding of *Ex parte Young*, 209 U.S. 123, 147 (1908), that due process precludes fines "so enormous . . . as to intimidate the company and its officers from resorting to the courts to test the[ir] validity." This Court should make clear that the ability of the recipient of an administrative order to secure judicial review via a "bet the company" gamble does not satisfy due process.

EPA's ability to impose billions of dollars in economic costs without the opportunity for any independent review presents an important issue of national regulatory policy. As this Court has noted, decision-

making insulated from meaningful review is prone to high rates of error. And on the occasions when EPA regulatory decisions have been subject to independent review, they have often been reversed. For example, in *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870, 1880, 1883-84 (2009), the Court rejected EPA's liability determination as to one PRP and required apportionment of costs as to another.

Thus, for reasons of both constitutional principle and sound regulatory policy, this Court should hold that ACOs and UAOs issued without prior hearings violate due process in the absence of exigent circumstances. In cases of genuine emergencies, the recipient of an ACO or UAO is entitled to a full and fair hearing as promptly as possible after the order is issued. The judgment below should be reversed.

ARGUMENT

I. DUE PROCESS REQUIRES A HEARING PRIOR TO THE EFFECTIVE DATE OF A UNILATERAL ADMINISTRATIVE ORDER

"'[T]he root requirement' of the Due Process Clause" is "'that an individual be given an opportunity for a hearing *before* he is deprived of any significant protected interest.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (citations omitted); *see also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) ("The right to prior notice and a hearing is central to the Constitution's command of due process. . . . We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after

the event.'" (citation omitted)). Even in emergency situations requiring the government to act before it can hold a hearing, the government must afford a prompt postdeprivation hearing. *See, e.g.*, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678-79 (1974). "In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking." *Zinermon v. Burch*, 494 U.S. 113, 132 (1990).[5]

The environmental ACO and UAO schemes fail this constitutional standard. They authorize the issuance of burdensome administrative orders, carrying draconian penalties for noncompliance, without providing for a prior hearing or (in cases of emergencies) a prompt post-issuance hearing. "The problem with ACOs stems from their injunction-like legal status coupled with the fact that they are issued without an adjudication or meaningful judicial review." *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236, 1241 (11th Cir. 2003). "The EPA is the

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[5] Accordingly, it is constitutionally irrelevant that CERCLA gives a UAO recipient that chooses to comply with an unlawful order some opportunity to seek reimbursement of its costs of compliance, *see* 42 U.S.C. § 9606(b)(2). "[N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972) (citation omitted and alteration in original). For similar reasons, a post-deprivation suit brought at the EPA's sole discretion is not "a meaningful avenue of relief." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 (2010) (quotation marks omitted).

ultimate arbiter of guilt or innocence, and the courts are relegated to a forum that conducts a proceeding, akin to a show-cause hearing, on the issue of whether an EPA order has been flouted." *Id.* at 1242.

At a minimum, due process demands that the recipient of such an order is entitled to prompt judicial review. The Government's principal response is that a unilateral administrative order does not entail a deprivation of property or liberty because ACOs and UAO are not "self-executing," Brief In Opposition ("BIO") at 4: the recipient can elect to defy the order and is not assessed a civil penalty until EPA subsequently brings an enforcement action in court—even though $37,500 daily penalties begin running from the effective date of the order, 40 C.F.R. § 19.4.

The Government's argument fails for two reasons. *First*, a party suffers a deprivation of property immediately upon the effective date of an administrative order, even if the statutory scheme contains a "sufficient cause" defense, as in CERCLA. 42 U.S.C. §§ 9606(b)(1), 9607(c)(3). *Second*, the coercive impact of the staggering financial penalties available to EPA in an enforcement action violates *Ex parte Young*, 209 U.S. 123 (1908).

A. The Opportunity To Defy An Order Does Not Provide Due Process Because It Still Entails A Deprivation Of Property

It is undisputed that a party that complies with an ACO or UAO is deprived of property—the costs of compliance—without any predeprivation hearing. The sole issue then, for due process purposes, is whether the recipient of a unilateral order suffers pre-hearing deprivation of property even if it chooses to defy EPA.

The answer to this question is clearly yes. A noncomplying ACO or UAO recipient incurs an immediate deprivation of property because the enormous potential statutory penalties have a tangible, here-and-now market impact. The violator of an ACO under the CWA is subject to civil penalties of up to $37,500 "per day for each violation" of the compliance order. 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4. In the case of UAOs, CERCLA imposes treble damages plus penalties of $37,500 per day for noncompliance, and EPA can and does defer judicial review for years while those potential liabilities mount. *See* 42 U.S.C. §§ 9606(b)(1), 9607(c)(3); 40 C.F.R. § 19.4. Hence, should EPA decide to wait the full five years before bringing an enforcement action, a party would be liable for nearly $68.5 million *per violation*. In the modern market economy, the creation of such a huge contingent liability creates an immediate financial drag on unilateral order recipients.

Therefore, any party that defies an administrative order in order to challenge it in court faces immediate and sustained economic damage. As one district court found in a case challenging EPA's issuance of UAOs under CERCLA, based on an extensive record, "noncomplying PRPs suffer a significant decrease in brand and market value." *GE*, 595 F. Supp. 2d at 30; *see also id.* at 24 ("PRPs are deprived of some portion of the market value of their stock if they decide not to comply with a UAO."); *id.* at 25 ("PRPs are deprived of a protected property interest—the value of their brand—when they do not comply with a UAO."). One economist cited in that case found that noncompliance with a UAO would cause a recipient, on average, an immediate $76.4 million decrease in market value and significant increase in financing costs. *Id.* at 23. Nor did EPA dispute the conclusion that a

recipient's failure to comply with a UAO would cause a significant decrease in stock price and an increase in its cost of financing. *Id.* at 25. The financial impact of defying a UAO diminishes the recipient's ability to bid for new projects or hire additional employees. *Id.* at 30. Indeed, the deprivations imposed by a UAO are so large that they "could put some PRPs out of business." *Id.*

Thus, the mere issuance of an administrative order results in an immediate deprivation of property within the meaning of the Fifth Amendment's due process clause. In *Connecticut v. Doehr*, 501 U.S. 1, 11-12 (1991), for example, this Court held that consequential impacts from government adjudicatory action can be "significant" enough "to merit due process protection." *Doehr* held that a state statute authorizing a *non*-possessory pre-judgment attachment of real estate affected "significant" property interests, thus triggering due process protection, because such an attachment "clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage." *Id.* at 11. *Doehr* found such harms to property interests "sufficient to merit due process protection" even if imposed by the market in response to the government action. *Id.* at 12; *see also Reardon v. United States*, 947 F.2d 1509, 1518 (1st Cir. 1991) (en banc) (relying on *Doehr* to conclude that a CERCLA lien resulted in deprivation of property where it "cloud[ed] title, limit[ed] alienability, [and] affect[ed] current and potential mortgages"). Administrative orders therefore deprive recipients of property without the protections necessary under the Fifth Amendment's Due Process Clause.

B. The Coercive Nature Of Such Schemes Violates Due Process Under *Ex parte Young*

The astronomical size of potential penalties that accumulate at the rate of $37,500 per day, per violation of EPA administrative orders means that, as a practical matter, no responsible party can challenge them. An EPA enforcement action brought five years after the issuance of the order, for example, would create liability of nearly $68.5 million *per violation*.

The ACO and UAO schemes thus conflict with this Court's century-old holding in *Ex parte Young*, 209 U.S. 123, 147 (1908), that due process precludes fines "so enormous . . . as to intimidate the company and its officers from resorting to the courts to test the[ir] validity." As this Court recently noted in a different context, "[w]e normally do not require plaintiffs to 'bet the farm by taking the violative action' before 'testing the validity of the law.'" *Free Enter. Fund*, 130 S. Ct. at 3151 (ellipsis omitted) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007), and citing *Ex parte Young*, 209 U.S. 123). In fact, the general rule is that, "where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *MedImmune*, 549 U.S. at 128-29 (emphasis omitted); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994) (holding that *Ex parte Young* precludes statutory schemes "in which *the practical effect* of coercive penalties for noncompliance [is] to foreclose all access to the courts" (emphasis added)); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (describing *Ex parte Young* as applying to

"a Hobson's choice," where party faced "potentially huge liability").

Under CERCLA, for example, EPA has issued over 1,700 UAOs during the last three decades to more than 5,400 PRPs compelling response actions costing an aggregate $5.5 billion, all in non-emergency situations and without any pre-issuance notice or hearing. *GE*, 595 F. Supp. 2d at 33. Yet only a handful of PRPs have ever sought or received independent judicial review of a UAO. As the district court in *GE* noted, "empirical evidence concerning actual instances of UAO noncompliance is scarce because very few publicly-traded firms have chosen not to comply with UAOs." *Id.* at 23. The extremely high compliance rate demonstrates the overwhelmingly coercive nature of the statutory UAO scheme.

This Court should reaffirm that judicial review is "merely nominal and illusory" where it can be obtained "only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law." *Wadley S. Ry. Co. v. Georgia*, 235 U.S. 651, 661 (1915). As *Ex parte Young* and similar cases demonstrate, the opportunity to obtain judicial review by defying an administrative order—even under a "sufficient cause" requirement as in CERCLA, 42 U.S.C. §§ 9606(b)(1), 9607(c)(3)—is not enough to save a statutory scheme that carries such draconian penalties as the CWA or CERCLA.

For example, in *Missouri Pacific Railway Co. v. Nebraska*, 217 U.S. 196 (1910), a state statute compelled rail companies to install, at their own expense, switch connections and side tracks at the request of grain elevators meeting certain statutory criteria. There was no prior hearing into whether the grain

elevator's requests met the statutory criteria and a rail company that refused to comply with a request was subject to $500 in penalties. *Id.* at 204-05. The Court held that the statute violated the rail companies' right to due process, stating that the rail company, "if it has any remedy at all, acts at its risk, not merely of being compelled to pay both the expense of building and the costs of suit, but also of incurring a fine of at least $500 for its offense in awaiting the result of a hearing." *Id.* at 208. If an unreviewable $500 fine could violate the due process clause in 1910, a similarly unreviewable threat of a $68.5 million penalty likewise violates the due process clause a century later.

In *Chicago, Milwaukee, & St. Paul Railway Co. v. Polt*, 232 U.S. 165, 167-68 (1914), the Court struck down a South Dakota statute that imposed double liability on rail companies for fire damage caused by a locomotive engine unless the railroad either paid the full amount of the plaintiff's demand within sixty days, or the plaintiff's ultimate jury award was less than the settlement amount tendered by the rail company. The Court held that possibility of future penalties worked an immediate deprivation and impermissibly chilled the exercise of rights:

> [T]he rudiments of fair play required by the 14th Amendment are wanting when a defendant is required to guess rightly what a jury will find, or pay double if that body sees fit to add 1 cent to the amount that was tendered, although the tender obviously was futile because of an excessive demand.

Id. at 168; *see also Chicago, Milwaukee & St. Paul Ry. Co. v. Kennedy*, 232 U.S. 626, 627 (1914) (presenting same issue).

Similarly, in *Missouri Pacific Railway Co. v. Tucker*, 230 U.S. 340, 346 (1913), the Court struck down a state scheme imposing $500 penalties for violations of a common-carrier rate statute, even though the carrier could not be subject to penalties until a court had decided whether a violation had occurred. State courts had upheld the scheme, reasoning that, "so long as the [carrier] cannot be made to suffer until a competent court had passed upon the justice of the legislative rates, the guaranties of the Federal Constitution are not infringed." *Id.* at 349. The Court rejected that reasoning:

> [T]he imposition of $500 as liquidated damages is not only grossly out of proportion to the possible actual damages, but is so arbitrary and oppressive that its enforcement would be nothing short of the taking of property without due process of law, and therefore in contravention of the 14th Amendment.

Id. at 350; *see also St. Louis, Iron Mountain & S. Ry. Co. v. Wynne*, 224 U.S. 354, 358–61 (1912) (striking down state law imposing double liability and an attorneys' fee recovery from rail company refusing to pay demand for killing of livestock); *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 64-65 (1919) ("[T[he imposition of severe penalties as a means of enforcing a rate . . . is in contravention of due process of law, where no adequate opportunity is afforded the carrier for safely testing, in an appropriate judicial proceeding, the validity of the rate—that is, whether it is confiscatory or otherwise—before any liability for the penalties attaches.").

The foundation of these decisions has only been strengthened by the emergence in recent decades of the unconstitutional conditions doctrine, beginning with *Speiser v. Randall*, 357 U.S. 513 (1958). In *Speiser*, this Court invalidated California's decision to deny a property tax exemption to veterans who refused to declare that they would not advocate for the overthrow of the government. *See id.* at 519; *see also Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 593 (1926) (striking down state law conditioning use of the public highways on a private carrier's agreement to abide by certain terms and conditions of doing business: "[i]n reality, the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden"). The coercive effect of such conditions has since been recognized in a wide range of contexts, including conditions on unemployment compensation,[6] public employment,[7] public subsidies,[8] and building permits.[9]

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[6] *See, e.g., Sherbert v. Verner*, 374 U.S. 398 (1963) (invalidating state unemployment compensation provision denying benefits to a Seventh Day Adventist who refused to work on Saturdays).

[7] *See, e.g., Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (overturning dismissal of teacher for speech on matters of public concern).

[8] *See, e.g., Legal Serv. Corp. v. Velazquez*, 531 U.S. 533 (2001) (invalidating speech-restrictive condition on legal aid funding); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (invalidating speech-restrictive condition on public broadcasting subsidies).

[9] *See, e.g., Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (invalidating condition on a building permit requiring the property owner's grant of a public easement); *Dolan v. City of*

The UAO and ACO schemes similarly impose a coercive condition on the fundamental right of access to judicial review, one of "the most precious of the liberties safeguarded by the Bill of Rights." *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 526 (2002) (quotation marks omitted); *see also Tennessee v. Lane*, 541 U.S. 509, 523 (2004). This Court has repeatedly held that if the price of saying "no" to an administrative order and asserting the right to judicial review is the risk of astronomical penalties, the law is invalid. *See Chicago & N.W. Ry. Co. v. Nye-Schneider-Fowler Co.*, 260 U.S. 35, 47 (1922) ("Penalties imposed on one party for the privilege of appeal to the courts, deterring him from vindication of his rights, have been held invalid under the Fourteenth Amendment.").

Ex parte Young and, by analogy, the unconstitutional conditions doctrine thus foreclose any suggestion that the government may condition the exercise of the fundamental due process right to judicial review upon undertaking the risk of draconian penalties.

C. Judicial Discretion Over Damages Does Not Eliminate The Due Process Violation

The Government has also defended the CWA and CERCLA administrative order schemes by suggesting that the judicial role in setting penalties remedies the due process violation. BIO at 9. In the decision below, for example, the Court of Appeals opined:

> [T]he civil penalties provision is committed to judicial, not agency, discretion. . . . Any penalty

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Tigard, 512 U.S. 374, 385 (1994) (same, and reaffirming "the well-settled doctrine of 'unconstitutional conditions'").

> ultimately assessed against the Sacketts would therefore reflect a discretionary, judicially determined penalty, taking into account a wide range of case-specific equitable factors, and imposed only after the Sacketts have had a full and fair opportunity to present their case in a judicial forum.

Pet. App. A14-A15.

Judicial discretion, however, cannot save the statutory schemes from constitutional infirmity. In other contexts, the Court has condemned what it has described as "uncertain[] and arbitrary judicial discretion." *Downum v. United States*, 372 U.S. 734, 738 (1963) (internal quotation marks omitted); *see, e.g.*, *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("One must concede that unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."); *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982) (noting "the general due process restrictions on the court's discretion" in imposing discovery sanctions); *Taylor v. Hayes*, 418 U.S. 488, 500 (1974) (citing "fundamental due process protections" in judicial contempt proceedings).

Such concerns are applicable here. In the very small number of cases in which PRPs have failed to comply with UAOs, for example, judicial discretion has proved cold comfort to the alleged violators. Courts have awarded EPA punitive damages and penalties even where PRPs received legal advice, based on governing case law, that they were not

liable under the UAO,[10] even where the penalties sought by EPA were 10 times greater than its costs,[11] and even where the EPA waited over a decade years after issuing its UAO to bring an enforcement action.[12]

In short, the possibility of judicial discretion does not provide assurance sufficient to cure the due process violation inherent in the ACO and UAO schemes.

D. At A Minimum, Due Process Demands Prompt Judicial Review Of An ACO Or UAO

This Court should make clear that, where an ACO or UAO is issued without a full and fair administrative hearing, due process demands that the recipient is entitled to prompt judicial review in a federal court. When an administrative order contains adjudicative determinations, like those embodied in ACOs and UAOs, it is "imperative" that the recipient be able to invoke "the procedures which have traditionally been associated with the judicial process." *Hannah v. Larche*, 363 U.S. 420, 442 (1960). Hence, the recipient is entitled to notice and an opportunity to be heard; discovery; the opportunity to present testimony and documentary evidence; the chance to cross-examine opposing witnesses and respond to opposing evidence; and a neutral decision-maker who issues

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[10] *See United States v. Capital Tax Corp.*, No. 04-C-4138, 2007 WL 2225900, at *13 (N.D. Ill. Aug. 1, 2007), *vacated on other grounds*, 545 F.3d 525 (7th Cir. 2008).

[11] *United States v. LeCarreaux*, No. 90-1672, 1992 WL 108816, at *17-*18 (D.N.J. Feb. 19, 1992).

[12] *United States v. General Electric Co.*, No. 06-CV-354-B, 2010 WL 4977478, at *1-*2 (D.N.H. Dec. 3, 2010)

findings of fact and conclusions of law to explain the decision. As a matter of due process, such independent review must occur prior to the effective date of the administrative order. In cases of actual emergencies or imminent and substantial endangerment—a circumstance lacking when EPA now issues a UAO, *see GE*, 595 F. Supp. 2d at 32—then EPA could provide clear guidelines providing for prompt judicial review thereafter.

II. UNILATERAL ORDERS' DEPARTURE FROM DUE PROCESS INFLICTS SIGNIFICANT ECONOMIC COSTS ON THE NATION WITHOUT ADEQUATE POLITICAL ACCOUNTABILITY

The ACO and UAO schemes have allowed EPA to avoid the usual principles of accountability on which the political process depends. EPA has used administrative orders to impose billions of dollars in economic costs under the radar, without having to subject its decisions to independent review. Since CERCLA was enacted in 1980, it has led to the imposition of tens of billions of dollars in regulatory costs and has been the subject of intense academic and political debate. *See, e.g.*, Stephen Breyer, BREAKING THE VICIOUS CYCLE: TOWARD EFFECTIVE RISK REGULATION 18-19 (1993). These costs—and in particular the risks of error in the imposition of such costs—have been greatly magnified by EPA's unfettered unilateral order authority.

Unilateral orders such as ACOs and UAOs may be issued at the sole discretion of EPA's prosecutorial staff without any review by impartial decision-makers. Since the late 1980s, EPA has steadily removed even the most rudimentary protections against erroneous decision-making by, for example,

delegating UAO authority away from EPA headquarters and down the chain of command in regional offices, issuing UAOs early in the negotiations process, and increasing the pressure on EPA employees to issue UAOs to relieve budgetary problems.[13]

The results of such unchecked administrative action are predictable. Professor W. Kip Viscusi, who served on EPA's Science Advisory Board for over a decade and is currently on the EPA Homeland Security Committee, found that CERCLA remedy selections are primarily driven by public relations variables rather than environmental conditions. The key determinants of cleanup decisions are not EPA's own hazard ranking scores, but rather the voting percentage in the county, the number of environmental groups, the environmental rating of congressional representatives, and media attention.[14]

This Court has long recognized that ex parte or unilateral government action raises a grave risk of error and attendant due process problems. For example, in *Connecticut v. Doehr*, this Court found the risk of error too great even where a judge re-

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[13] *See GE*, 595 F. Supp. 2d at 34 ("Although there is no direct financial incentive at work here, EPA arguably stands to benefit by issuing UAOs because EPA has an interest in conserving Superfund resources. The risk of error is also greater when junior or regional agency staff, without senior or centralized oversight, make deprivation-causing decisions. UAOs are issued by regional EPA officials without review and approval from EPA headquarters." (citation omitted)).

[14] W. Kip Viscusi & James T. Hamilton, CALCULATING RISKS: THE SPATIAL AND POLITICAL DIMENSIONS OF HAZARDOUS WASTE POLICY (1999); W. Kip Viscusi & James T. Hamilton, *Are Risk Regulators Rational? Evidence from Hazardous Waste Cleanup Decisions*, 89 AMER. ECON. REV. 1010 (1999).

viewed a complaint and affidavit prior to the attachment because there was no countervailing force to the potentially "one-sided, self-serving and conclusory submissions." 501 U.S. at 14. Similarly, in *James Daniel Good Real Property*, the Court held that allowing the government to effect a deprivation of property via an ex parte probable cause hearing before a neutral magistrate—a considerably greater protection than that afforded by EPA in unilateral order schemes—nonetheless suffered from an unacceptably high risk of error. *See* 510 U.S. at 55–56. "Fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Id.* at 55 (brackets and internal citation omitted, ellipsis in original); *see also N. Georgia Finishing v. Di-Chem*, 419 U.S. 601 (1975) (ex parte garnishment statute violates Due Process Clause); *Fuentes*, 407 U.S. at 67 (ex parte replevin scheme violates due process); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (prejudgment garnishment of wages without prior notice violates Due Process Clause).

On the relatively rare occasions when EPA decisions have been subjected to judicial review, the agency has often lost in court. *See, e.g., Burlington N. & Santa Fe Ry. Co.*, 129 S. Ct. at 1880, 1883-84 (rejecting liability determination as to one PRP and requiring apportionment of costs as to another); *United States v. Ottati & Goss, Inc.*, 900 F.2d 429, 441 (1st Cir. 1990) (Breyer, J.) (rejecting EPA remedy imposing soil standard for PCBs based on assumption

that "children will eat a little bit of dirt each day for 245 days per year for three and a half years").[15]

In short, sound regulatory policy (as well as constitutional principle) favors a holding that due process requires a hearing prior to the effective date of an adjudicatory administrative order, in the absence of true exigent circumstances.

CONCLUSION

The judgment below should be reversed.

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[15] *See also United States v. Burlington N. R.R. Co.*, 200 F.3d 679, 694 (10th Cir. 1999) (finding that EPA acted arbitrarily and capriciously in modifying remedy at site); *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 904-08 (5th Cir. 1993) (finding that EPA acted arbitrarily and capriciously in deciding to provide alternative water supply absent evidence of public health need); *United States v. B & D Electric, Inc.*, No. 1:05CV63, 2007 WL 1395468 (E.D. Mo. May 9, 2007) (EPA erroneous in designating defendants as liable parties under CERCLA); *United States v. Wedzeb Enterprises, Inc.*, 844 F. Supp. 1328 (S.D. Ind. 1994) (EPA erroneous in designating GE and another defendant as liable parties under CERCLA); *cf. United States v. Tarkowski*, 248 F.3d 596, 599 (7th Cir. 2001) (EPA acted arbitrarily and capriciously in issuing access order under CERCLA Section 104; "EPA takes the extreme position that, provided it has probable cause to believe there is even a thimbleful of a hazardous substance spilled in a person's yard, or we suppose even a drop, it has an absolute right to an access order regardless of the action it proposes to take once it gains that access, such as excavating the entire yard and removing the soil to a depth of ten feet, thus rendering the property wholly useless to the owner.").

Respectfully submitted,

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AMICUS CURIAE BRIEF

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v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. DUE PROCESS PROTECTS PRIVATE PROPERTY AND ANY MECHANISM THAT DEPRIVES A PROPERTY OWNER OF HIS OR HER PROPERTY MUST BE SUBJECT TO MEANINGFUL REVIEW AT A MEANINGFUL TIME 4

A. The Concept Of "Due Process" Is Grounded In The Notion That There Must Be An Adequate Opportunity For A Property Owner To Be Heard Before The Government Deprives Him Of His Property 4

B. Administrative Compliance Orders Deprive Property Owners Of Valuable Rights And Are Susceptible To Extreme Abuse 9

II. ADMINISTRATIVE COMPLIANCE ORDERS ARE NOT "PRE-ENFORCEMENT" BUT ARE GOVERNMENTAL ORDERS SUBJECT TO JUDICIAL REVIEW 12

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Abbott Lab. v. Gardener, 387 U.S. 136 (1967) 16, 17

Alvarez v. Smith, 130 S. Ct. 576 (2009) 1

Armstrong v. Manzo, 380 U.S. 545 (1965) 5

Brody v. Village of Port Chester, 345 F.3d 103 (2d Cir. 2003) 11

Fuentes v. Shevin, 407 U.S. 67 (1972) 5

Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) 5, 10, 11

Mathews v. Eldridge, 424 U.S. 319 (1976) 5

MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118 (2007) 17

Snyder v. Massachusetts, 291 U.S. 97 (1934) 4, 18

Solesbee v. Balkcom, 339 U.S. 9 (1950) 4, 9

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) 1

TVA v. Whitman, 336 F.3d 1236 (11th Cir. 2003) 13, 14, 16

United States v. L.A. and Salt Lake R.R. Co., 273 U.S. 299 (1927) 15

CONSTITUTIONAL PROVISION

U.S. Const. amend. V 2, 5, 9, 18

TABLE OF AUTHORITIES – Continued

Page

STATUTE

33 U.S.C. § 1319(d) 13

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Roscoe Pound, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY (1957) 8

Sir Edward Coke, INSTITUTES OF THE LAWS OF ENGLAND, PART II (1641) 7

INTEREST OF THE *AMICUS CURIAE*[1]

The Institute for Justice (IJ) is a nonprofit, public interest law firm committed to defending the essential foundations of a free society and securing the constitutional protections necessary to ensure individual liberty. A central pillar of IJ's mission is to protect the rights of individuals to own and enjoy their property, both because an individual's control over his or her property is a tenet of personal liberty and because property rights are inextricably linked to all other civil rights. The ability of the government to interfere with private property without adequate process gravely threatens individual liberty. For this reason, IJ both litigates property rights cases that defend the property rights of individuals and files *amicus curiae* briefs in important cases, including *Alvarez v. Smith*, 130 S. Ct. 576 (2009), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). If other governmental agencies were to adopt an enforcement mechanism like that used by the Environmental Protection Agency in this case, the constitutional guarantee of due process under the law would be

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[1] Counsel for the parties in this case did not author this brief in whole or in part. The counsels of record for each party received timely notice of intent to file this *amicus curiae* brief and gave their consent. Letters memorializing such consent have been filed with the clerk. No person or entity, other than *amicus curiae* Institute for Justice, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

severely harmed and the ability to own and use private property would be subject to the unrestrained and unreviewed orders of government officials. IJ therefore has an interest in the development of a rule of law that recognizes the importance of private property in our constitutional scheme and helps protect such property by providing speedy, adequate and timely judicial review of governmental action that deprives a landowner of the use and enjoyment of her property.

SUMMARY OF THE ARGUMENT

The Due Process Clause of the Fifth Amendment protects private property by guaranteeing a fair and timely review when the government deprives the owner of the use and enjoyment of her property. Indeed, the concept of "due process" grew out of conditions on the government's ability to seize property contained in the *Magna Carta*. Thus, from the very beginning of the Anglo-American legal tradition, the protection of private property has required pre-deprivation process.

In the Clean Water Act (CWA or the "Act"), Congress has granted the Environmental Protection Agency (EPA) the ability to unilaterally deprive a property owner of his or her rights without providing meaningful review at a meaningful time. Under the Act, an "Administrative Compliance Order" imposes significant and unavoidable harm to the property

owner's right to use and enjoy his or her property. Because these orders are unilateral and unreviewable except at some point in the distant future, they are susceptible to extreme abuse. The Administrative Compliance Order mechanism thus strikes at the very heart of what the Due Process Clause was supposed to prevent – arbitrary governmental action that deprives a property owner of his interests in property without the owner ever having an adequate opportunity to defend himself.

The government has nonetheless sought to avoid judicial review of such orders by calling them "pre-enforcement." An Administrative Compliance Order is not pre-enforcement, however; it is active enforcement. An Administrative Compliance Order mechanism is a command by the government that results in immediate, severe and significant financial harm to a property owner. An Administrative Compliance Order thus acts as a cudgel by which the EPA can coerce a property owner into doing exactly what the government wants. A system where the government orders a citizen to do something and provides only burdensome alternatives to compliance with no possibility of judicial review for years is not due process and has no place in our constitutional order. The decision of the U.S. Court of Appeals for the Ninth Circuit should therefore be reversed.

ARGUMENT

I. DUE PROCESS PROTECTS PRIVATE PROPERTY AND ANY MECHANISM THAT DEPRIVES A PROPERTY OWNER OF HIS OR HER PROPERTY MUST BE SUBJECT TO MEANINGFUL REVIEW AT A MEANINGFUL TIME

A. The Concept Of "Due Process" Is Grounded In The Notion That There Must Be An Adequate Opportunity For A Property Owner To Be Heard Before The Government Deprives Him Of His Property

"It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due Process is that which comports with the deepest notions of what is fair and right and just." *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting); *see also Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (due process represents "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental").

It is beyond dispute that protecting property by requiring adequate process is "deeply embedded in the traditions and feelings of our people." For this reason, this Court has "ensur[ed] that no person will be deprived of his interests in the absence of a

proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). And the "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Administrative Compliance Orders fail this test.[2] The general modern rule is "due process requires an opportunity for a hearing *before* a deprivation of property takes effect." *Fuentes v. Shevin*, 407 U.S. 67, 88 (1972) (emphasis added).

By guaranteeing due process, the Fifth Amendment protects an individual's private property from the arbitrary use of government power. Indeed, the requirement of adequate process has been the indispensible mechanism by which Anglo-American law has protected private property against government encroachment. In the *Magna Carta*, the English barons restrained King John's ability to deprive them of property not by forbidding the Crown from seizing property, but by requiring that the barons first be

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[2] In this brief, *amicus curiae* assumes for the sake of argument that the Ninth Circuit was correct when it concluded that, in the CWA, Congress foreclosed review of Administrative Compliance Orders under the Administrative Procedure Act (APA). For the reasons stated in Petitioners' Brief, however, IJ concurs with Petitioners that review of such orders is available under the APA and that the availability of such review mitigates the due process problems such orders create. *See* Pet'rs' Br. 32-50.

provided adequate process before the Crown could act. Thus, in Chapter 39 of the *Magna Carta*, the barons conditioned the circumstances under which the Crown could strip them of their property: "No free man shall be . . . stripped of his rights or possessions . . . except by the lawful judgement of his equals or by the law of the land." *Magna Carta*, ch. 39.[3] The *Magna Carta* thus linked the provision of adequate process to the underlying rights the barons wished to protect: "The main point in this plan, the chief grievance to be redressed, was the King's practice of attacking his barons with forces of mercenaries, seizing their persons, their families and property, and otherwise ill-treating them, without first convicting them of some offence in his *curia*." C.H. McIlwain, *Due Process of Law in* Magna Carta, 14 Colum. L. Rev. 27, 41 (1914).[4]

As English law developed, the link between process and property solidified. Parliament codified

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[3] This translation of the *Magna Carta* is available at the Fordham University Internet History Sourcebook Project webpage, http://www.fordham.edu/halsall/source/magnacarta.asp (*last visited* September 29, 2011).

[4] There is some dispute over whether the phrases "law of the land" and "due process" are synonymous, but it is well-established that the use of the term "law of the land" represented an effort to reassert customary law, including procedural protections, in the place of arbitrary royal command. James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 Const. Commentary 315, 320 (1999). *See also* Bernard Siegan, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT 6-28 (2001).

the *Magna Carta* when it passed the so-called "six statutes" interpreting Chapter 39 in 1354. The third statute declared: "'Item, That no man of what estate or condition that he be shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law.'" Robert E. Riggs, *Substantive Due Process in 1791*, 1990 Wis. L. Rev. 941, 954 (1990) (quoting 28 Edw. 3, ch. 3 (1354)). Lord Coke also recognized that the *Magna Carta* was aimed at protecting property and other underlying rights by requiring an adequate process before the government could act. *See* Sir Edward Coke, INSTITUTES OF THE LAWS OF ENGLAND, PART II 45-46 (1641) ("No man shall be disseised, that is, put out of seison, or dispossessed of his free-hold (that is) lands, or livelihood, or of his liberties, or free customes, that is, of such franchises, and free-domes, and free-customes, as belong to him by his free birth-right, unlesse it be by the lawfull judgement, that is, verdict of his equals (that is, of men of his own condition) or by the law of the land (that is, to speak it once for all) by the due course, and processe of law.").[5]

Roscoe Pound (in a discussion particularly relevant to the Sacketts' predicament) noted the influence Lord Coke's reading of the *Magna Carta* had on

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[5] Lord Coke referred to Chapter 39 as Chapter 29, which was the corresponding chapter of the *Magna Carta* when it was reissued in 1225 and subsequently enacted by Parliament. Riggs, 1990 Wis. L. Rev. at 958.

American constitutional law, particularly those portions of the *Institutes* where Lord Coke "considers the necessity of giving one whose rights are to be affected by official action a full and fair opportunity to meet the case against him – something we have been forgetting in much summary administrative action nowadays." Roscoe Pound, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 49 (1957). The Founders thus accepted the English view that procedural requirements were a vital weapon against tyranny. This view arose not only from the influence of Lord Coke, but Sir William Blackstone's writings as well. *See* Charles A. Miller, *The Forest of Due Process of Law, in* DUE PROCESS 3, 7 (J. Roland Pennock & John W. Chapman, eds., (1977)) (quoting Blackstone's classification of property as "'the third absolute right, inherent in every Englishman . . . of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land'"). As James Madison stated, "That is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest. A magistrate issuing his warrants to a press gang, would be in his proper functions in Turkey or Indostan, under appellations proverbial of the most compleat despotism." James Madison, *Property, in* JAMES MADISON: WRITINGS 515, 516 (Jack N. Rakove ed., 1999). The prevalence of this approach at the time

of the country's founding is reflected in the writings of the Founders, the Due Process Clause itself, and the Northwest Ordinance, adopted in 1787, which provided: "No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land. . . ." Northwest Ordinance (1787), *reproduced in* 1 Melvin I. Urofsky & Paul Finkelman, DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY 78 (2d ed. 2002).

Thus, since 1215, Anglo-American law has prevented the government from interfering with property without first providing access to a "lawful judge or his equals or by the law of the land," by a "lawfull judgement," or "due course, and processe of law." The principle and language are ancient but still relevant. "However quaint some of these ancient authorities of our law may sound to our ears, the Twentieth Century has not so far progressed as to outmode their reasoning. We should not be less humane than were Englishmen in the centuries that preceded this Republic." *Solesbee*, 339 U.S. at 19 (Frankfurter, J., dissenting).

B. Administrative Compliance Orders Deprive Property Owners Of Valuable Rights And Are Susceptible To Extreme Abuse

The question then is whether Administrative Compliance Orders deprive a property owner of the use and enjoyment of his property without the property owner having had access to the "due course, and processe of law"? The answer is clearly "yes." Administrative Compliance Orders thus violate more than

the Due Process Clause of the Fifth Amendment; they are repugnant to eight centuries of Anglo-American legal tradition.

As Petitioners have demonstrated, Administrative Compliance Orders deprive property owners of valuable property rights. The order here turns the Sacketts' property into a nature preserve and forbids them from excluding federal officials from their property. Pet'rs' Br. 17-18. The only other choice available to them is to risk crippling civil, and perhaps criminal, sanctions when all they want is a court to review the Administrative Compliance Order to determine whether the EPA legally issued it.

Moreover, the need for judicial oversight of Administrative Compliance Orders is especially urgent because the potential for abuse inherent in such orders is very high. For instance, under the Act, the EPA Administrator may issue an Administrative Compliance Order "on the basis of any information available to him" indicating that a person is violating the Act. App. A-5. The Administrator's decision can apparently be made in secret and only with the possibility of judicial review years in the future. Pet'rs' Br. 22. Under the Act, there is no mechanism to immediately determine whether the "any information" relied upon by the Administrator is accurate. There is no mechanism to determine whether such information even exists. Nor is there is any mechanism to determine whether the Administrator is acting for the public's good or for some private interest. *Cf. Jerrico*, 446 U.S. at 242 (a prosecutor with a financial or private interest in the outcome of a proceeding

violates due process). And there is no mechanism by which a property owner may inquire into the motivations, interests, or intent of the Administrator.

Finally, there is no mechanism to determine whether the Administrator is simply making a mistake. The Due Process Clause is directly concerned with avoiding mistaken or unjustified deprivations of rights. *See id.* A mechanism that presents a property owner with a range of bad choices, but deprives her of the ability to demonstrate that the government is acting erroneously, in bad faith, or arbitrarily does not comport with due process.

Of course, it does not matter whether the EPA is correct and the agency is ultimately able to demonstrate that the Sacketts did, in fact, violate the Act. The Due Process Clause requires that the Sacketts be provided adequate process before that decision can deprive them of valuable property rights. *See Brody v. Village of Port Chester*, 345 F.3d 103, 112 (2d Cir. 2003) ("In a procedural due process challenge, the question before the court is whether the process affording the plaintiff an opportunity to participate in governmental decision-making before being deprived of his liberty or property was accurate, not whether the government's decision to deprive the plaintiff of such liberty or property was ultimately correct.") (opinion of Sotomayor, J.). The point here is that adequate process is necessary because the risk that the EPA's decision may be wrong goes up substantially when a property owner is unable to challenge the basis for that decision. The risk of error or abuse

is even more acute in this case, where the Sacketts claim that the EPA does not even have jurisdiction over their property in the first place.

In short, when it created Administrative Compliance Orders, Congress created a mechanism by which the EPA, for any reason whatsoever, can order property owners to either comply with the government's restrictions on their property or suffer staggering financial losses, all without the property owner having timely access to an impartial judiciary. King John himself could not have designed a more oppressive or abusive system to bend his subjects to his will. This is not "just government," and it is not due process. The Ninth Circuit should therefore be reversed.

II. ADMINISTRATIVE COMPLIANCE ORDERS ARE NOT "PRE-ENFORCEMENT" BUT ARE GOVERNMENTAL ORDERS SUBJECT TO JUDICIAL REVIEW

The Ninth Circuit below, like other circuits, characterized Administrative Compliance Orders as "pre-enforcement" agency actions without legal consequence and therefore unripe for review. This is incorrect.

In fact, Administrative Compliance Orders are legal determinations by the EPA ripe for judicial review. The orders carry the status of law, command immediate action from property owners, and both impose and threaten severe consequences for noncompliance. The status of such orders as "active

enforcement" is demonstrated by the Act itself, the wording of the orders, and the EPA's treatment of them.

The Act states that "any person who violates any [Administrative Compliance Order] issued by the Administrator . . . shall be subject to a civil penalty not to exceed $25,000 per day for each violation." 33 U.S.C. § 1319(d). The language of the Act is not tentative, ambiguous or conditional; it does not say "may" or "only after efforts to mitigate any damage have failed." It says that if you violate an Administrative Compliance Order, you "shall" be subject to a penalty. Moreover, the Act clearly indicates that a property owner will be liable if he violates the Administrative Compliance Order, regardless of whether he actually violated the Act in the first place. As the Eleventh Circuit held in examining a similar provision of the Clean Air Act (CAA), this language "undeniably authorize[s] the imposition of severe civil and criminal penalties based solely upon noncompliance with an [Administrative Compliance Order]." *TVA v. Whitman*, 336 F.3d 1236, 1255 (11th Cir. 2003). A government order does not lack legal consequence when defying it results in civil and criminal penalties.[6]

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[6] The Ninth Circuit noted that if the Act is read literally to make violations of Administrative Compliance Orders alone the basis for liability, then such orders "could indeed create a due process problem." App. A-10. It therefore "interpreted" the Act to require that civil and criminal penalties be dependent on whether or not there was an underlying violation of the Act.

(Continued on following page)

The language the EPA uses in its Administrative Compliance Orders also demonstrates that they are not merely suggestions from the government. They command the property owner to comply with various statutory requirements within a specific timeline with mandatory language and the patina of a judicial order. For instance, the revised Administrative Compliance Order at issue in this case contains "FINDINGS AND CONCLUSIONS" and styles itself an "ORDER issued pursuant to the authority vested in the Administrator of the Environmental Protection Agency." App. G-1. The "ORDER" section of the Administrative Compliance Order uses the words "shall" or "must" at least eleven times. App. G-4-G-6. It references the "requirements of this Order." App. G-5. It states it becomes "effective on the date it is signed." App. G-6. Again, there is no indication that the commands contained in the document are tentative, preliminary or without binding legal effect.

However, this is not an "interpretation" or "construction" of the statute; it is a rewriting of it. As the Eleventh Circuit correctly found, "no canon of statutory interpretation can trump the unambiguous language of a statute." *TVA*, 336 F.3d at 1255. Even assuming that Congress did not really mean what it said and Administrative Compliance Orders are simply toothless suggestions from government officials, those orders nonetheless do irreparable harm to regulated parties. No regulated party could reasonably rely on an interpretation of the CWA that so clearly departs from its plain language at the risk of crushing fines and criminal penalties for willful violations.

In that regard, if Administrative Compliance Orders are mere notices of general policy with little to no legal effect, a delay of judicial review would not have the severe consequences the Sacketts face here. *See, e.g.*, *United States v. L.A. and Salt Lake R.R. Co.*, 273 U.S. 299, 309-10 (1927) ("The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing anything; which does not grant or withhold any authority, privilege, or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation."). In fact, however, an Administrative Compliance Order is not a generalized notice but a specific command that asserts jurisdiction over the Sacketts' property and threatens penalties unless they take specific, burdensome actions by specified dates.

Finally, the EPA itself treats Administrative Compliance Orders as active enforcement of the Act, even though the federal government has a history of treating Administrative Compliance Orders differently depending on whether they are standing in front of a judge or in front of a property owner. Before the courts, the government has argued Administrative Compliance Orders are simply a way to encourage a property owner to pay attention to a potential problem. Before the property owner, however, Administrative Compliance Orders are, as their name tells

us, orders. They are a command from the government to do as you are told. This approach allows the government to achieve its enforcement goals without the delay or oversight attendant to judicial review: "Why does the EPA stake out a position in court that differs from the position it takes when it issues an ACO to a regulated party? One possibility is that the EPA likes to have its cake and eat it too – employing the harsh provisions of the CAA when confronting a potentially recalcitrant party, but hesitant to reveal the legal significance of [Administrative Compliance Orders] in court for fear that the very part of the CAA that makes [Administrative Compliance Orders] so effective will be struck down." *TVA*, 336 F.3d at 1251 n. 26. The fact that a federal agency has in the past so cavalierly treated its responsibilities to both the courts and the people that it purports to serve demonstrates that Administrative Compliance Orders issued by that agency should be subject to judicial review as early in the process as possible.

This conclusion is also consistent with this Court's precedents. This Court considered a similar governmental effort to compel compliance in *Abbott Laboratories v. Gardener*, 387 U.S. 136 (1967). In that case, a drug manufacturer was faced with a ruling from the FDA that determined that it was required by statute to replace the labels on its products. The company could "[e]ither . . . comply with the . . . requirement and incur the costs of changing over their promotional material and labeling or . . . follow their present course and risk prosecution." *Id.* at 152

(quotation marks omitted). The order gave them a choice between "immediate compliance," which required time consuming and expensive changes in conduct and disobeying the order as an "alternative to compliance . . . [which was] even more costly." *Id.* at 152-53. This Court held that this coercive ruling was subject to immediate judicial review and the Court should follow that precedent here. *Id.*

Finally, the Ninth Circuit's view that receipt of an Administrative Compliance Order forecloses judicial review would create the absurd result where a property owner could challenge the EPA's *threatened* enforcement of the Act, but could not challenge the agency's *actual* enforcement of it. This Court has, of course, long recognized that "where threatened action by the *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007). Here, the government has carried out its threat of enforcement, but the very application of the law purportedly forecloses judicial review. If the Ninth Circuit is affirmed, this will do little but encourage property owners to preemptively sue the EPA when there is any possibility that the CWA may apply to a property so that property owners can preserve their ability to obtain timely judicial review. The better approach would be to recognize that Administrative Compliance Orders are final agency action subject to judicial review.

This Court should therefore reject the path taken by the lower courts to avoid the clear import of Administrative Compliance Orders by dismissing them as "pre-enforcement" actions with no legal consequences. "A fertile source of perversion in constitutional theory is the tyranny of labels." *Snyder*, 291 U.S. at 114. Calling an Administrative Compliance Order a "pre-enforcement" mechanism does not make it so. It is essential that this Court foreclose the ability of governmental agencies to avoid judicial review of agency action by simply slapping a "pre-enforcement" label on its activities when the agency is clearly engaging in active enforcement. Permitting such a dangerous end run around the Due Process Clause would remove essential protections from property owners across the country.

CONCLUSION

Administrative Compliance Orders violate the Due Process Clause of the Fifth Amendment as well as eight centuries of Anglo-American legal tradition by depriving property owners of the use of their property without access to meaningful review. They are an active form of enforcement that the Due Process Clause requires be subject to meaningful judicial

review at a meaningful time. The Ninth Circuit should therefore be reversed.

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AMICUS CURIAE BRIEF

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AND
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In The
Supreme Court of the United States

CHANTELL SACKETT and MICHAEL SACKETT,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LISA P. JACKSON, Administrator,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. May Petitioners seek pre-enforcement judicial review of the administrative compliance order pursuant to the Administrative Procedure Act, 5 U.S.C. § 704?

2. If not, does Petitioners' inability to seek pre-enforcement judicial review of the administrative compliance order violate their rights under the Due Process Clause?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
IDENTITY AND INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. JUDICIAL REVIEW OF THE SACKETTS' COMPLIANCE ORDER IS AVAILABLE UNDER THE APA, BECAUSE THE CWA DOES NOT "EXPRESSLY" PRECLUDE REVIEW	4
A. The Sacketts' Compliance Order Is Final Agency Action, Reviewable Under 5 U.S.C. § 704	4
B. Under 5 U.S.C. § 559, The CWA Cannot Preclude Judicial Review Because It Does Not "Expressly" Supersede The APA	7
II. CONGRESS DID NOT INTEND TO PRECLUDE JUDICIAL REVIEW OF COMPLIANCE ORDERS THAT ASSERT JURISDICTION BASED ON FACTUALLY INTENSIVE ANALYSIS	13
A. The CWA's Statutory Scheme Does Not Evince An Intent To Limit Judicial Review Of Compliance Orders	15
B. The Objectives Of The CWA Are Not Hampered By Judicial Review Of Compliance Orders	17

TABLE OF CONTENTS – Continued

Page

C. The CWA's Legislative History Does Not Evince An Intent To Limit Judicial Review Of Compliance Orders 18

D. The Nature Of Compliance Orders Calls Out For Immediate Judicial Review 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Alaska Dept. of Environmental Conservation v. EPA, 540 U.S. 461 (2004) 5, 7

Allsteel, Inc. v. EPA, 25 F.3d 312 (6th Cir. 1994) 5

Asbestec Constr. Servs. v. EPA, 849 F.2d 765 (2d Cir. 1988) 6

Bennett v. Spear, 520 U.S. 154 (1997) 4, 5, 6, 7

Block v. Cmt. Nutrition Inst., 467 U.S. 340 (1984) ..... *passim*

Cannon v. Gates, 538 F.3d 1328 (10th Cir. 2008) 16

Dickinson v. Zurko, 527 U.S. 150 (1999) 11

Fairbanks North Star Borough v. U.S. Army Corps of Engineers, 543 F.3d 586 (9th Cir. 2008) 5

Five Points Road Joint Venture v. Johanns, 542 F.3d 1121 (7th Cir. 2008) 9

Franklin v. Massachusetts, 505 U.S. 788 (1992) 5

Heikkila v. Barber, 345 U.S. 229 (1953) 9, 12

Laguna Gatuna, Inc. v. United States, 50 Fed. Cl. 336 (2001) 2, 21

Lake Carriers' Ass'n v. EPA, 2011 WL 2936926 (D.C. Cir. 2011) 9

Lane v. U.S. Dept. of Agriculture, 120 F.3d 106 (8th Cir. 1997) 9

Marcello v. Bonds, 349 U.S. 302 (1955) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991) 17

Nat'l Labor Relations Bd. v. Un. Food & Comm. Workers Union, 484 U.S. 112 (1987) 12

Ninilchik Traditional Council v. United States, 227 F.3d 1186 (9th Cir. 2000) 9

Sackett v. EPA, 622 F.3d 1139 (9th Cir. 2010) ... *passim*

Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1 (2000) 12

Shaughnessy v. Pedreiro, 349 U.S. 48 (1955) 8, 9, 10, 12, 13

Solar Turbines, Inc. v. Seif, 879 F.2d 1073 (3d Cir. 1989) 6

Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) 12, 21, 22

United States v. Erika, Inc., 456 U.S. 201 (1982) 12

Webster v. Doe, 486 U.S. 592 (1988) 11

STATUTES

Administrative Procedure Act, 79 Pub. L. No. 404, 60 Stat. 237 (1946) ..... *passim*

Agricultural Marketing Agreement Act of 1937, 50 Stat. 246 (1937) 11

Federal Mine Safety and Health Amendments Act of 1977, 91 Stat. 1290 (1977) 12

TABLE OF AUTHORITIES – Continued

Page

Federal Water Pollution Control Amendments of 1972, 92 Pub. L. No. 500, 86 Stat. 816 (1972) 8

National Labor Relations Act, 49 Stat. 455 (1935) 12

Water Pollution Control Act of 1948, 80 Pub. L. No. 404, 62 Stat. 1155 (1948) 8

5 U.S.C. § 554(d) 10

5 U.S.C. § 559 ..... *passim*

5 U.S.C. §§ 701-706 8

5 U.S.C. § 701 11

5 U.S.C. § 701(a)(1) 7

5 U.S.C. § 704 ..... 2, 4, 7

30 U.S.C. § 801 12

33 U.S.C. § 1251(a) 13

33 U.S.C. § 1251(b) 14, 16

33 U.S.C. § 1319 8

33 U.S.C. § 1319(a) 22

33 U.S.C. § 1319(a)(3) 5, 15

33 U.S.C. § 1319(c)(1)-(2) 20

33 U.S.C. § 1319(d) 6, 20, 22

42 U.S.C. § 9613(h) 16, 17

TABLE OF AUTHORITIES – Continued

Page

RULES AND REGULATIONS

Supreme Court Rule 37 1

40 C.F.R. § 230.3 14

OTHER AUTHORITIES

68 Fed. Reg. 1991 (Jan. 15, 2003) 14

76 Fed. Reg. 24,479 (May 2, 2011) 14

Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 ENVTL. L. 189 (1994) 16, 19

"Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*" (Dec. 2, 2008) 14

S. Rep. No. 92-414, 1972 U.S.C.C.A.N. 3668 (1972) 17, 19

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37(3), Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to the defense and preservation of individual liberty, the right to own and use property, limited and ethical government, and the free enterprise system. Since MSLF's creation in 1977, MSLF attorneys have been involved in numerous cases involving the proper interpretation and administration of the Clean Water Act ("CWA"). *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, ___ U.S. ___, 129 S.Ct. 2458 (2009) (amicus curiae); *Carlota Copper Co. v. Friends of Pinto Creek*, ___ U.S. ___, 129 S.Ct. 896 (2009) (amicus curiae);

[1] Pursuant to Supreme Court Rule 37(6), counsel for MSLF affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, its members, or counsel, made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

National Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007) (amicus curiae); *Rapanos v. United States*, 547 U.S. 715 (2006) (amicus curiae); *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133 (10th Cir. 2005), *cert. denied*, 547 U.S. 1065 (2006) (amicus curiae); *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (2001) (represented plaintiff); *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996) (represented plaintiff); *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985) (represented intervenor); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (amicus curiae).

Moreover, MSLF has members throughout the United States. MSLF's members have a tangible interest in this case. Many of these members' livelihoods depend on the continued development of minerals, oil and gas, timber, agriculture, livestock, and commercial and residential real estate. Many of these activities require the use of land and water resources that could be impacted by the regulatory authority asserted by Respondents. Therefore, MSLF respectfully submits this amicus curiae brief, urging that the judgment of the Ninth Circuit be reversed.

SUMMARY OF THE ARGUMENT

The Sacketts' compliance order is final agency action, reviewable under 5 U.S.C. § 704. The compliance order is premised on the Environmental Protection

Agency ("EPA") Administrator's determination that the subject property falls under the jurisdiction of the CWA, and that the Act has been violated. The compliance order represents the consummation of the agency's decisionmaking process with respect to these issues and violation of the compliance order carries with it independent legal consequences.

Because the CWA was enacted subsequent to the Administrative Procedure Act ("APA"), section 12 of the APA requires that any modification of the judicial review provisions of the APA must be "expressly" stated in the CWA. 5 U.S.C. § 559. Here, the Ninth Circuit entirely ignored the controlling significance of the fact that the CWA does not expressly preclude immediate judicial review of compliance orders. Instead, the Ninth Circuit focused on "fairly discernable" inferences gleaned from the CWA. *Id*. The Ninth Circuit's approach violates the plain language of the APA and this Court's precedents.

Moreover, the Ninth Circuit's conclusion that the structure of the CWA, its objectives, its legislative history, and the nature of compliance orders all indicate that the CWA forecloses immediate judicial review is plainly in error. By analyzing the statutory scheme in a vacuum, the Ninth Circuit failed to recognize that the EPA has expanded its jurisdiction to such an extent that denying immediate judicial review of compliance orders in this context is inconsistent with Congressional intent in passing the

CWA. Accordingly, the judgment of the Ninth Circuit should be reversed.

ARGUMENT

I. JUDICIAL REVIEW OF THE SACKETTS' COMPLIANCE ORDER IS AVAILABLE UNDER THE APA, BECAUSE THE CWA DOES NOT "EXPRESSLY" PRECLUDE REVIEW.

A. The Sacketts' Compliance Order Is Final Agency Action, Reviewable Under 5 U.S.C. § 704.

The APA provides for judicial review of "final agency action for which there is no other adequate remedy in a court. . . ." 5 U.S.C. § 704. The CWA provides no opportunity for immediate review of compliance orders, and therefore they are judicially reviewable under the APA if they are "final agency action." *See Sackett v. EPA*, 622 F.3d 1139, 1143 (9th Cir. 2010); Petitioners' Brief on the Merits ("Petitioners' Brief") at 54. This Court has adopted a two-part test for determining the finality of an agency action. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). First, the action must represent the consummation of the agency's decisionmaking process; "it must not be of a merely tentative or interlocutory nature." *Id.* at 177-78. Second, "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 178 (quoting *Port of Boston Marine Terminal Assn. v.*

Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970)); *see also Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) ("The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties."). As demonstrated below, the Sacketts' compliance order satisfies the *Bennett* test and is therefore final agency action reviewable under the APA.

The compliance order is premised on the EPA Administrator's determination that the subject property falls under the jurisdiction of the CWA, and that the Act has been violated. 33 U.S.C. § 1319(a)(3); *see Bennett*, 520 U.S. at 177-78. The compliance order represents the consummation of the agency's decisionmaking process with respect to these issues. *See Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461, 483 (2004) ("*ADEC*") (holding, in challenge to Clean Air Act ("CAA") compliance order, that "[w]e are satisfied that the Court of Appeals correctly applied the guides we set out in *Bennett v. Spear*. . . ."); *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586, 592 (9th Cir. 2008); *Allsteel, Inc. v. EPA*, 25 F.3d 312, 315 (6th Cir. 1994). Here, the compliance order represents the agency's "considered, definite and firm position" that it has regulatory authority over the Sacketts' property pursuant to the CWA. *Fairbanks North Star Borough*, 543 F.3d at 593; *Sackett*, 622 F.3d at 1141 ("The compliance order alleged that the Parcel is a wetland subject to the Clean Water Act. . . .").

Therefore, under the first prong of the *Bennett* test, the Sacketts' compliance order is final agency action reviewable under the APA.

The Sacketts' compliance order also satisfies the second prong of the *Bennett* test, because violation of the compliance order carries with it independent legal consequences. *See Bennett*, 520 U.S. at 178; *ADEC*, 540 U.S. at 483. Although issuance of the compliance order is premised on a violation of the CWA, the compliance order creates independent remedial obligations and disobedience of these obligations results in additional, free-standing penalties – penalties which are entirely separate from those flowing from a violation of the substantive provision of the CWA. *See* 33 U.S.C. § 1319(d) (authorizing civil penalty of up to $25,000 per day for violation of a compliance order); *cf. Solar Turbines, Inc. v. Seif*, 879 F.2d 1073, 1081 (3d Cir. 1989) (no penalties flowed from violation of stop-work order under [CAA], so order was not final action); *Asbestec Constr. Servs. v. EPA*, 849 F.2d 765, 767-68 (2d Cir. 1988) (order under [CAA], requiring "future compliance" with statute imposed no new obligations and was not a final action). Here, the compliance order required the Sacketts "to remove the fill material and restore the Parcel to its original condition." *Sackett*, 622 F.3d at 1141. If the Sacketts fail to undertake the remedial measures dictated in the compliance order, they face civil and administrative fines of up to $43,500 per day. *Id.* Plainly, "legal consequences will flow" from the issuance of the compliance order. *Bennett*, 520

U.S. at 178. Therefore, under the second prong of the *Bennett* test, the compliance order is final agency action reviewable under the APA.

B. Under 5 U.S.C. § 559, The CWA Cannot Preclude Judicial Review Because It Does Not "Expressly" Supersede The APA.

As demonstrated above, the Sacketts' compliance order is final agency action reviewable under 5 U.S.C. § 704. The Ninth Circuit implicitly reached this same conclusion, consistent with this Court's related precedent. *ADEC*, 540 U.S. at 483. Where the Ninth Circuit erred in this case was in its application of *Block v. Cmt. Nutrition Inst.*, 467 U.S. 340, 351 (1984), to determine that judicial review was precluded by section 10 of the APA, 5 U.S.C. § 701(a)(1) ("This chapter applies, according to the provisions thereof, except to the extent that . . . statutes preclude judicial review."). *Sackett*, 622 F.3d at 1144. The Ninth Circuit's *Block* analysis focused on "fairly discernable" inferences gleaned from the CWA rather than its express language. *Id.* As demonstrated below, this departure from the express language of the CWA violates section 12 the APA. *See* 5 U.S.C. § 559; Petitioners' Brief at 52. Accordingly, judicial review of the Sacketts' compliance order is available under the APA and the Ninth Circuit erred in concluding otherwise.

Statutes enacted subsequent to the APA cannot "preclude judicial review" under section 10 of the APA unless they do so "expressly." 5 U.S.C. § 559 ("Subsequent statute may not be held to supersede or modify [5 U.S.C. §§ 701-706] except to the extent that it does so expressly."); *Marcello v. Bonds*, 349 U.S. 302, 310 (1955); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 50 (1955). The provision of the CWA at issue here, 33 U.S.C. § 1319, was passed subsequent to the APA, and, as the Ninth Circuit recognized, "[t]he CWA . . . does not expressly preclude pre-enforcement judicial review" of compliance orders. *Sackett*, 622 F.3d at 1143; *compare* Administrative Procedure Act, 79 Pub. L. No. 404, §§ 10, 12, 60 Stat. 237, 243-44 (1946) *with* Federal Water Pollution Control Amendments of 1972, 92 Pub. L. No. 500, § 309, 86 Stat. 816, 859 (1972). Even the earliest statutory ancestor of 33 U.S.C. § 1319 was also passed after the APA. *See* Water Pollution Control Act of 1948, 80 Pub. L. No. 404, § 2, 62 Stat. 1155, 1156 (1948). Thus, section 12 of the APA requires that if the CWA was intended to supersede the judicial review provisions of the APA, it must have done so "expressly." Thus the Ninth Circuit erred by departing from the express language of the CWA.

As this Court has noted, "[e]xemptions from the terms of the Administrative Procedure Act are not lightly to be presumed in view of the statement in section 12 of the Act that modifications must be express." *Marcello*, 349 U.S. at 310; *Shaughnessy*, 349 U.S. at 50. Various Courts of Appeals have likewise

recognized that "[s]ection 559 therefore prevents a statute from amending the APA by implication." *Five Points Road Joint Venture v. Johanns*, 542 F.3d 1121, 1127 (7th Cir. 2008); *see also Lake Carriers' Ass'n v. EPA*, 2011 WL 2936926, *4 (D.C. Cir. 2011); *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1193 (9th Cir. 2000); *Lane v. U.S. Dept. of Agriculture*, 120 F.3d 106, 109 (8th Cir. 1997).

This Court's decisions in *Shaughnessy* and *Marcello* illustrate the folly of the Ninth Circuit's analysis in this case. These decisions demonstrate that statutes passed subsequent to the APA must employ express language in order to supersede the judicial review provisions of the APA.

In *Shaughnessy*, this Court held that the APA provided a right to judicial review of deportation orders issued under the Immigration and Nationality Act of 1952. 349 U.S. at 51-52. This was so because the 1952 Act contained "no language which 'expressly' supersedes or modifies the expanded right of review granted by section 10 of the Administrative Procedure Act." *Shaughnessy*, 349 U.S. at 51 (quoting 5 U.S.C. § 559). The government had urged this Court to interpret the 1952 Act to preclude judicial review, as this Court had done when reviewing deportation orders issued under the Immigration Act of 1917, which pre-dated the APA. *See Heikkila v. Barber*, 345 U.S. 229, 234 (1953). The *Shaughnessy* Court,

however, declined to implicitly preclude judicial review under section 10 of the APA:

> Such a restrictive construction of the finality provision of the present Immigration Act would run counter to § 10 and § 12 of the Administrative Procedure Act. Their purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes like the 1952 Immigration Act.

349 U.S. at 51. Likewise, the CWA is a subsequently enacted statute that cannot be read to implicitly preclude judicial review under section 10 of the APA. The Ninth Circuit failed to follow this Court's decision in *Shaughnessy* and its judgment should therefore be reversed.

In *Marcello*, decided just one month after *Shaughnessy*, this Court made clear that 5 U.S.C. § 559 requires that subsequent legislation can modify judicial review under the APA only when it does so expressly. *Marcello*, 349 U.S. at 309. The question presented in *Marcello* was whether the Supplemental Appropriation Act of 1951 was intended to modify the "separation of functions" provision of section 5(c) of the Administrative Procedure Act, 5 U.S.C. § 554(d), with respect to deportation orders. *Id.* at 305-06. This Court concluded that because the 1951 Act "expressly states: 'The procedure (herein prescribed) shall be the sole and exclusive procedure for determining the deportability of an alien under this section[,]' " it provided "clear and categorical direction [that the 1951 Act] was meant to exclude the application of

[section 5(c) of] the Administrative Procedure Act." *Id.* at 309. Thus, *Marcello* demonstrates the sort of "clear and categorical direction" this Court has required in order for subsequently enacted statutes to overcome the judicial review provisions of the APA. No such direction is present in the CWA, and the Ninth Circuit therefore erred in foreclosing judicial review of the Sacketts' compliance order.

This Court's decision in *Block* is consistent with the requirements of 5 U.S.C. § 559. *See* 467 U.S. at 345. Unlike the CWA at issue in this case, the statute in *Block* was passed before the APA. *Id.* at 341 (citing Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246, as amended, 7 U.S.C. § 601 *et seq.*). Thus, the requirement that a "[s]ubsequent statute may not be held to supersede or modify [5 U.S.C. §§ 701-706] except to the extent that it does so expressly" was inapplicable in *Block*. *See Webster v. Doe*, 486 U.S. 592, 607 n. (1988) (Scalia, J., dissenting) ("While a right to judicial review of agency action may be created by a separate statutory or constitutional provision, once created it becomes subject to the judicial review provisions of the APA unless specifically excluded, *see* 5 U.S.C. § 559."). The *Block* court was thus not constrained in the way that this Court is in the present case by 5 U.S.C. § 559.

This Court's subsequent decisions are likewise consistent with 5 U.S.C. § 559. This Court has looked to the express statutory language of post-APA statutory schemes when determining whether 5 U.S.C. § 701 forecloses review. *See Dickinson v. Zurko*, 527

U.S. 150, 155 (1999) ("[5 U.S.C. § 559's] intent that legislative departure from the norm must be clear suggests a need for similar clarity in respect to grandfathered common-law variations."); *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 12-13 (2000) (relying on the Medicare Act's express bar to conclude that judicial review was foreclosed); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 208-09 (1994) (holding federal court jurisdiction was precluded by the "comprehensive review process" of the Federal Mine Safety and Health Amendments Act of 1977, 91 Stat. 1290, as amended, 30 U.S.C. § 801 *et seq.*); *see also United States v. Erika, Inc.*, 456 U.S. 201, 206-08 (1982) (relying on Medicare Part B's express administrative review provisions to conclude that judicial review was foreclosed). On the contrary, in cases where the statute at issue pre-dates the APA (and is thus not subject to 5 U.S.C. § 559) this Court has required a weaker showing to preclude judicial review of agency action. *See Nat'l Labor Relations Bd. v. Un. Food & Comm. Workers Union*, 484 U.S. 112, 117 (1987) (foreclosing judicial review absent express language, but under section 10(f) of the National Labor Relations Act, 49 Stat. 455 (1935), which predates the APA); *Block*, 467 U.S. at 345; *Heikkila*, 345 U.S. at 234.

Because the CWA was enacted subsequent to the APA, section 12 of the APA requires that any modification of the judicial review provisions of the APA must be "expressly" stated in the CWA. 5 U.S.C. § 559; *Marcello*, 349 U.S. at 309; *Shaughnessy*, 349

U.S. at 51. Here, the Ninth Circuit entirely ignored the controlling significance of the fact that "[t]he CWA . . . does not expressly preclude pre-enforcement judicial review" of compliance orders. *Sackett*, 622 F.3d at 1143. Instead, as discussed in more detail below, the Ninth Circuit focused on "fairly discernable" inferences gleaned from the CWA. *Id.* The Ninth Circuit's approach violates 5 U.S.C. § 559 and this Court's decisions in *Marcello* and *Shaughnessy*. Accordingly, the judgment of the Ninth Circuit should be reversed.

II. CONGRESS DID NOT INTEND TO PRECLUDE JUDICIAL REVIEW OF COMPLIANCE ORDERS THAT ASSERT JURISDICTION BASED ON FACTUALLY INTENSIVE ANALYSIS.

As demonstrated above, the Ninth Circuit erred in its application of *Block* in this case. Nevertheless, the Ninth Circuit's analysis under *Block* fails to capture Congressional intent as embodied in the CWA, especially in light of recent developments impacting the scope of the EPA's purported CWA jurisdiction.

Congress could not have predicted the vast expansion of jurisdiction that the EPA has pursued since the CWA was enacted. Congress passed the CWA for the stated purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). At the same time, Congress chose to "recognize,

preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the [EPA] Administrator in the exercise of his authority under this chapter." *Id.* § 1251(b). Almost since the passage of the CWA, the EPA has pursued a relentless crusade to expand its authority under the Act. *See, e.g.*, 40 C.F.R. § 230.3; 76 Fed. Reg. 24,479 (May 2, 2011) ("2011 Draft Guidance"); "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*" (Dec. 2, 2008) ("2008 Guidance"); 68 Fed. Reg. 1991 (Jan. 15, 2003). EPA's latest attempt to expand its jurisdiction sets a new high-water mark for regulatory overreach; with the 2011 Draft Guidance, the EPA has eviscerated the responsibilities and rights of States that Congress intended to leave untouched by the CWA and has asserted jurisdiction over essentially the entire Nation.

This jurisdictional expansion has worked a dramatic realignment of the *Block* factors. *Block*, 467 U.S. at 351 (Congressional intent to preclude review must be "fairly discernible" based on "the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved."). The Ninth Circuit did not address how this change in CWA jurisdiction impacts the regulatory system intended by Congress when it passed the CWA.

The Ninth Circuit concluded that each of the *Block* factors – except the CWA's text, which it ignored – indicated that Congress intended to limit immediate judicial review of compliance orders. However, as demonstrated below, the Ninth Circuit analyzed the statutory scheme in a vacuum. The Ninth Circuit failed to recognize that the EPA has consistently expanded its CWA jurisdiction since the Act was first passed. As illustrated by the facts of the Sacketts' case, the EPA has expanded its jurisdiction to such an extent that denying immediate judicial review of compliance orders in this context is inconsistent with Congressional intent in passing the CWA. The EPA's ongoing attempt to further expand its authority will only compound this problem. Accordingly, the judgment of the Ninth Circuit should be reversed.

A. The CWA's Statutory Scheme Does Not Evince An Intent To Limit Judicial Review Of Compliance Orders.

The Ninth Circuit's consideration of the CWA's statutory scheme conflates the enforcement options available to the EPA with the due process rights of property owners:

> Congress gave the EPA a choice of "issu[ing] an order requiring such person to comply with such section or requirement, *or* . . . bring[ing] a civil action [in district court]." 33 U.S.C. § 1319(a)(3) (emphasis added). Authorizing pre-enforcement judicial review of

> compliance orders would eliminate this choice by enabling those subject to a compliance order to force the EPA to litigate all compliance orders in court. . . . Such a result would be discordant with the statutory scheme.

Sackett, 622 F.3d at 1143 (citation omitted). That the CWA gives the EPA two enforcement options does nothing to suggest that property owners may not challenge the EPA's jurisdiction pursuant to the APA. This is especially so because – despite the EPA's self-serving efforts to expand the scope of the CWA – the Act was not intended to provide the singular mechanism for regulating water pollution. *Cf. Block*, 467 U.S. at 341-42; 33 U.S.C. § 1251(b). If Congress had intended such a result, it knew how to override the judicial review provided by the APA. *Cf.* 42 U.S.C. § 9613(h); *Cannon v. Gates*, 538 F.3d 1328, 1332 (10th Cir. 2008) ("In enacting this jurisdictional bar, Congress intended to prevent time-consuming litigation. . . ."); Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 ENVTL. L. 189, 203 n. 72 (1994) ("In 1986, Congress provided for express preclusion of pre-enforcement review in the Superfund Amendments and Reauthorization Act.").

Moreover, the CWA's enforcement options present an illusory choice for the EPA – compliance order sanctions must be imposed through the courts. *Sackett*, 622 F.3d at 1143. The Ninth Circuit thus "infer[red] that Congress intended that all challenges to the compliance order be brought in one proceeding," but this ignores the fact that the language of the

CWA indicates no intent to limit the jurisdiction of the federal courts under the APA. *Id.*; *cf.* 42 U.S.C. § 9613(h). Thus, contrary to the Ninth Circuit's conclusion, "enabling those subject to a compliance order to force the EPA to litigate all compliance orders in court" is not "discordant with the statutory scheme"; rather, the CWA requires all compliance orders to be litigated before they can be enforced and does nothing to limit the rights of property owners to bring an action in federal court to challenge the basis for a compliance order before crippling fines begin to accumulate. *Id.*; *see McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991) (holding judicial review is not foreclosed by availability of federal court enforcement mechanism).

B. The Objectives Of The CWA Are Not Hampered By Judicial Review Of Compliance Orders.

The Ninth Circuit concluded that the statutory objective of compliance orders was to allow swift enforcement of environmental protection laws. *Sackett*, 622 F.3d at 1144. But this swift enforcement was intended to take place in a jurisdictional context far different than that which exists today. Congress envisioned that compliance orders would be used in "relatively narrow fact situations requiring a minimum of discretionary decision making or delay." S. Rep. No. 92-414, 1972 U.S.C.C.A.N. 3668 at 3730 (1972). Given the extent of the EPA's jurisdiction at the time of the CWA's enactment, jurisdictional

questions would not be factually intensive or require a great deal of discretion.

As the Sacketts' case illustrates, the EPA has expanded its jurisdiction to such an extent that the "relatively narrow fact situations" envisioned by Congress are no longer the norm. Instead, the EPA regularly conducts "fact-specific analysis to determine whether [lands and waters] have a significant nexus with a traditional navigable water." 2008 Guidance at 5; 2011 Draft Guidance at 5. For example, in this case there is no continuous surface connection between the Sacketts' property and any relatively permanent water body. Petitioners' Brief at 6. The Sacketts performed the normal round of due diligence inspections before buying the land and had no reason to believe that development of the land would be subject to CWA permitting. *Id.* Accordingly, Congress could not have intended to preclude judicial review of compliance orders in the present context, where the EPA's authority is based on tedious, factually intensive analysis of complicated hydrological systems.

C. The CWA's Legislative History Does Not Evince An Intent To Limit Judicial Review Of Compliance Orders.

The Ninth Circuit found no support for its theory in the CWA's legislative history, so it reviewed the legislative history of the CAA instead. *Sackett*, 622 F.3d at 1144. Although the two statutes share common features, whatever inferences can be conjured

from the legislative history of one Act can hardly be imported to the unique factual context of another. The Ninth Circuit thought it significant that the CAA's legislative history reflects a conference committee amendment that removed a provision that would have expressly provided for pre-enforcement review of CAA administrative compliance orders. *Id.* But that deletion was unexplained and the Conference Committee may have simply seen the review provision in the CAA as redundant of the APA's express grant of judicial review. Davis, *Judicial Review of Environmental Compliance Orders*, 24 ENVTL. L. at 199. Congressional intent to limit immediate judicial review of CWA compliance orders is thus not fairly discernable from this strained reading of the CAA's legislative history.

Moreover, whatever might be gleaned from the CAA's legislative history, the *CWA's* legislative history plainly contradicts the notion that Congress intended that the EPA would exercise broad authority to dispense compliance orders at the fringes of Congress's constitutional authority, with no judicial oversight until such time as the EPA deemed judicial review necessary. Instead, Congress intended the CWA to apply in those "relatively narrow fact situations requiring a minimum of discretionary decision making or delay," where the EPA's authority was clear and unambiguous. S. Rep. No. 92-414, 1972 U.S.C.C.A.N. 3668 at 3730 (1972). Accordingly, Congress could not have intended to preclude judicial review of compliance orders in the present context, where the EPA's

authority is based on tedious, factually intensive analysis of complicated hydrological systems.

D. The Nature Of Compliance Orders Calls Out For Immediate Judicial Review.

The Ninth Circuit misconstrued the nature of the administrative action involved here. In analyzing the Sacketts' due process argument, the Ninth Circuit viewed the compliance order as a mere precursor to actual enforcement of a violation of the CWA. *Sackett*, 622 F.3d at 1145-46. This conclusion ignores the consequences of defying a compliance order and is contradicted by the plain text of the CWA.

The CWA imposes substantial consequences for failing to comply with the terms of a compliance order. Just one month of noncompliance puts a property owner at risk of civil liability of more than $750,000. *See* 33 U.S.C. § 1319(d) (imposing maximum civil penalty of $25,000 per day per violation). A year's worth of noncompliance puts the liability over $9,000,000. *Id.* Moreover, a landowner who continues with a construction project in the face of a compliance order greatly increases the risk that the agency will seek criminal penalties against him. *See* 33 U.S.C. § 1319(c)(1)-(2) (imposing criminal penalties for negligent and knowing violations of the Act). If a property owner believes, as the Sacketts do, that the EPA has no authority to issue a compliance order their options are to acquiesce to the terms of the unlawful compliance order, or risk hundreds of

thousands of dollars in fines as they wait for EPA to enforce the demands contained in the compliance order. That creates a "constitutionally intolerable choice" between compliance with an unlawful order and crippling civil fines, coupled with the threat of criminal penalties. *Thunder Basin Coal Co.*, 510 U.S. at 218.

Moreover, it is a choice that creates perverse incentives for the EPA, especially in the face of its increasingly tenuous jurisdictional expansion. In a case where the EPA's jurisdiction is questionable, the agency has a strong incentive to bluff by issuing a compliance order. The EPA can then simply wait for the property owner to acquiesce to the compliance order. If the property owner complies, the EPA will have achieved whatever ends it sought. If the property owner does not comply, every day of noncompliance brings increased fines and therefore increased leverage for the EPA to force compliance. *See, e.g., Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336, 340 (2001) (noting that the plaintiff ceased all disposal operations after receiving a compliance order from the EPA and eventually sold for salvage the improvements it had made).

In a case like the Sacketts', where the property owner innocently filled an alleged wetland, the EPA loses nothing by taking this approach. The wetlands have already been filled. Whether the land is returned to its previous state now or later is immaterial. By threatening the property owner with a compliance order, the EPA avoids any direct challenge

to its jurisdiction until such time as it chooses to cash in its compliance order in federal court. But by that time, the "practical effect of coercive penalties for noncompliance [is] to foreclose all access to the courts." *Thunder Basin Coal Co.*, 510 U.S. at 218.

Also, as the Ninth Circuit acknowledged, the plain text of the CWA "could indeed create a due process problem." *Sackett*, 622 F.3d at 1145. That is because the CWA plainly allows the EPA to pursue penalties for violation of a compliance order, even if no violation of the CWA is ever proved. The CWA's enforcement provision provides, "any person who violates any order issued by the Administrator under [33 U.S.C. § 1319(a)], shall be subject to a civil penalty . . . for each violation." 33 U.S.C. § 1319(d). The Ninth Circuit simply assumed that the EPA would have to prove an underlying violation of the CWA; however, the Act plainly does not require this. *Id.*

As the foregoing demonstrates, the Ninth Circuit's conclusion that each of the *Block* factors forecloses immediate judicial review of compliance orders is plainly in error. By analyzing the statutory scheme in a vacuum, the Ninth Circuit failed to recognize that the EPA's consistent expansion of its CWA jurisdiction has worked a dramatic realignment of the *Block* factors. As illustrated by the facts of the Sacketts' case, the EPA has expanded its jurisdiction to such an extent that denying immediate judicial review of compliance orders in this context is inconsistent with Congressional intent in passing the CWA. The EPA's ongoing attempt to

further expand its authority will only compound this problem. Accordingly, the judgment of the Ninth Circuit should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-1062

In The

Supreme Court of the United States

CHANTELL SACKETT and MICHAEL SACKETT,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LISA P. JACKSON, Administrator,
Respondent.

On Writ of Certiorari to
The United States Court of Appeals
For the Ninth Circuit

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS, THE REAL ESTATE ROUNDTABLE AND NATIONAL APARTMENT ASSOCIATION IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

Page(s)

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. TO AVOID CONSTITUTIONAL QUESTIONS, THE CLEAN WATER ACT SHOULD BE CONSTRUED TO AFFORD JUDICIAL REVIEW TO THE SACKETTS 6

A. The Avoidance Principle and the Presumption Favoring APA Judicial Review 6

B. The Text of the CWA Does Not Expressly Preclude Judicial Review of EPA Compliance Orders 8

C. Nor Does the CWA's Structure or Intent Preclude Judicial Review of Compliance Orders 9

D. Cases Finding Statutory Structures That Foreclosed Judicial Review are Distinguishable 12

II. THE EPA'S COMPLIANCE ORDER IS FINAL AGENCY ACTION 16

A. The EPA's Action Was Complete 17

B. The Compliance Order Determined Rights and Obligations, and Produced Legal Consequences 19

III. THE EPA'S COMPLIANCE ORDER PROCESS VIOLATED THE SACKETTS' RIGHT TO DUE PROCESS 23

TABLE OF CONTENTS *(cont.)*

Page(s)

A. The Sacketts Hold a Property Interest Protected by the Due Process Clause 25

B. The Process Established By the CWA Denied the Sacketts of Due Process 27

1. The CWA Compliance Order Review Process 27

2. Application of the Mathews' Factors 31

a. The Sacketts' Interest v. The Government's Interest 32

b. The Risk of Erroneous Deprivation 34

CONCLUSION 39

TABLE OF APPENDICES

Page(s)

Appendix A, *Sackett*, Amended Administrative Compliance Order ..... App. A1

Appendix B, *Sackett*, Administrative Compliance Order ..... App. B1

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott Labs. v. Gardner, 387 U.S. 136 (1967) 7, 17

Abramowitz v. EPA, 832 F.2d 1071 (9th Cir. 1987) 17

Alaska, Dep't of Envtl. Conservation v. EPA, 244 F.3d 748 (9th Cir. 2001) *("Alaska I")* 17, 20, 21

Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461 (2004) *("Alaska II")* 17, 18, 21

Allsteel, Inc. v. EPA, 25 F.3d 312 (6th Cir. 1994) 18

Armstrong v. Manzo, 380 U.S. 545 (1965) 24

Bankers Life & Cas. Co. v. Callaway, 530 F.2d 625 (5th Cir. 1976) 9

Barry v. Barachi, 443 U.S. 55 (1979) 34

Bd. of Regents of State Coll. v. Roth, 408 U.S. 564 (1972) 26

Bennett v. Spear, 520 U.S. 154 (1997) ... 16, 18, 19, 21

Block v. Cmty. Nutrition Inst., 467 U.S. 340 (1984) 8, 10, 12-13, 14

Boddie v. Connecticut, 401 U.S. 371 (1971) 24

Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667 (1986) 10, 14-15

C. Dickman v. Comm'r of Internal Revenue, 465 U.S. 330 (1984) 19

TABLE OF AUTHORITIES (*cont.*)

Page(s)

Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970) 9

Clark v. Martinez, 543 U.S. 371 (2005) 6

Connecticut v. Doehr, 501 U.S. 1 (1991) 26, 33

DeBlasio v. Zoning Bd. of Adjustment for the Twp. of West Amwell, 53 F.3d 592 (3d Cir. 1995) 26

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 6

Ex Parte Young, 209 U.S. 123 (1908) 15

Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs, 543 F.3d 586 (9th Cir. 2008) 18

Fed. Deposit Ins. Corp. v. Mallen, 486 U.S. 230 (1988) 33

Free Enterp. Fund v. Public Co. Accounting Oversight Bd., 130 S. Ct. 3146 (2010) 15

F.T.C. v. Standard Oil Co. of Cal., 449 U.S. 232 (1980) 17

Fuentes v. Shevin, et al., 407 U.S. 67 (1972) 25-26, 32

Gilbert v. Homar, 520 U.S. 924 (1997) 24-25

Goss v. Lopez, 419 U.S. 565 (1975) 38

Grannis v. Ordean, 234 U.S. 385 (1914) 24

Heckler v. Campbell, 461 U.S. 458 (1983) 25

Heckler v. Chaney, 470 U.S. 821 (1985) 11-12

TABLE OF AUTHORITIES (*cont.*)

Page(s)

Immigration and Naturalization Serv. v. St. Cyr 533 U.S. 289 (2001) 6

Ingraham v. Wright, 430 U.S. 651 (1977) 24

Koretoff v. Vilsack, 614 F.3d 532 (D.C. Cir. 2010) ... 14

Malinski v. People of State of New York, 324 U.S. 401 (1945) 14

Mathews v. Eldridge, 424 U.S. 319 (1976) 5, 25, 31-32, 34, 38

Mich. Peat v. EPA, 175 F.3d 422 (6th Cir. 1999) 9

NAHB v. Defenders of Wildlife, 551 U.S. 644 (2007) . 1

Nat'l Wildlife Fed'n v. Whistler, 27 F.3d 1341 (8th Cir. 1994) 9

Rapanos v. United States, 547 U.S. 715 (2006) 10, 15, 28, 36-37

Riverside Irrigation Dist. v. Stipo, 658 F.2d 762 (10th Cir. 1981) 9

Sackett v. U.S. E.P.A., 622 F.3d 1139 (9th Cir. 2010) 26, 27, 29, 31, 32

Silverman v. United States, 365 U.S. 505 (1961) 32

Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) 6, 15

Swarthout v. Cooke, 131 S.Ct. 859 (2011) 24, 27

Switchmen's Union of N. Am. v. Nat'l Mediation Bd., 320 U.S. 297 (1943) 8

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Page(s)

Tenn. Valley Auth. v. Whitman, 336 F.3d 1236 (11th Cir. 2003) 36

United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) 35

United States v. Craft, 535 U.S. 274 (2002) 19

United States v. Fausto, 484 U.S. 439 (1988) 14

United States v. James Daniel Good Real Prop., 510 U.S. 43 (1993) 26, 32, 33, 34

United States v. On Lee, 193 F.2d 306 (2d Cir. 1951) 32

United States v. Rapanos, 235 F.3d 256 (6th Cir. 2000) 30

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

U.S. Const. amend. V 5, 23, 24

5 U.S.C. § 701(a) 7

5 U.S.C. § 701(a)(2) 10

5 U.S.C. § 704 ..... 7, 23, 27

5 U.S.C. § 706(2)(A) 13-14

5 U.S.C. § 706(2)(B) 14

5 U.S.C. § 706(2)(C) 14

28 U.S.C. § 1326(b) 33

28 U.S.C. § 2675 33

33 U.S.C. § 1319 30

TABLE OF AUTHORITIES (*cont.*)

Page(s)

33 U.S.C. § 1319(a) 9
33 U.S.C. § 1319(a)(3) 9
33 U.S.C. § 1319(b) 9, 30, 35-36
33 U.S.C. § 1319(d) 12, 21, 22, 31
33 U.S.C. § 1344 ..... 9, 12
33 U.S.C. § 1362(7) 36
33 U.S.C. § 1369(b) 9
33 U.S.C. § 1369(b)(1) 8
Idaho Code Ann. § 55-2506 (2011) 19-20
Idaho Code Ann. § 55-2508 (2011) 20
33 C.F.R. § 326.3(e)(1) 22, 27
33 C.F.R. § 326.3(e)(1)(i) 28
33 C.F.R. § 326.3(e)(1)(v) 28
33 C.F.R. § 331.1 28
33 C.F.R. § 331.10 ..... 27, 29, 30
33 C.F.R. § 331.11 ..... 28, 29
33 C.F.R. § 331.12 ..... 28, 29, 30
40 C.F.R. § 19.4 ..... 21, 22, 31
S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945) 7
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Page(s)

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Page(s)

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Draft Guidance on Identifying Waters Protected by the Clean Water Act, (2011), http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf..... 37

Brief of Resp'ts Envtl. Prot. Agency, et al. in Opp'n to Certiorari, No. 10-1062 (May 27, 2011)..... 22

INTEREST OF *AMICI CURIAE*

The National Association of Home Builders (NAHB), The Real Estate Roundtable and National Apartment Association have received the parties' written consent to file this *Amici Curiae* brief in support of Petitioners.[1]

NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's more than 160,000 members are home builders or remodelers, and its builder members construct about 80 percent of all new homes built each year in the United States.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and interests of its members. NAHB was a petitioner in another Clean Water Act case, *NAHB v. Defenders of Wildlife*, 551 U.S. 644 (2007). It also filed an amicus brief in support of the Sacketts' Petition for Certiorari.

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[1] Under Rule 37.6 of the Rules of this Court, *Amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amici*, their members, or their counsel contributed monetarily to the preparation and submission of this brief. The parties have given consent and the letters of consent to file this brief are attached.

The Real Estate Roundtable ("Roundtable") represents the leadership of the nation's top privately owned and publicly held real estate ownership, development, lending, and management firms, as well as the elected leaders of the 17 major national real estate industry trade associations. Collectively, Roundtable members hold portfolios containing over 5 billion square feet of developed property valued at over $1 trillion; over 1.5 million apartment units; and in excess of 1.3 million hotel rooms. Real estate firms represented through The Roundtable frequently obtain CWA permit coverage when developing and building their projects, under both section 402 (for discharges of stormwater) and section 404 (for discharges of fill material). Whether a land owner can obtain federal court review regarding "waters of the United States" jurisdiction on a parcel, which would trigger CWA permitting requirements, is of utmost importance to Roundtable members and the real estate community generally.

The National Apartment Association ("NAA") is the leading national advocate for quality rental housing. NAA is a federation comprised of 170 state and local affiliated associations, representing more than 50,000 members responsible for more than 5.9 million apartment units nationwide. NAA is the largest broad-based organization dedicated solely to rental housing in the United States. The association's membership is actively engaged in all aspects of the rental housing industry, including development, ownership, management, and financing of apartment communities.

NAA and NAA-affiliated associations advocate within the legal and legislative spheres on behalf of rental housing developers and operators, conduct apartment-related research, and promote the desirability of apartment living. The association actively participates in legal actions supporting the private property and due process rights of its members and advocates for fair governmental treatment of multi-family residential businesses with respect to taxation, fees, land use, zoning, and other issues affecting the real estate industry.

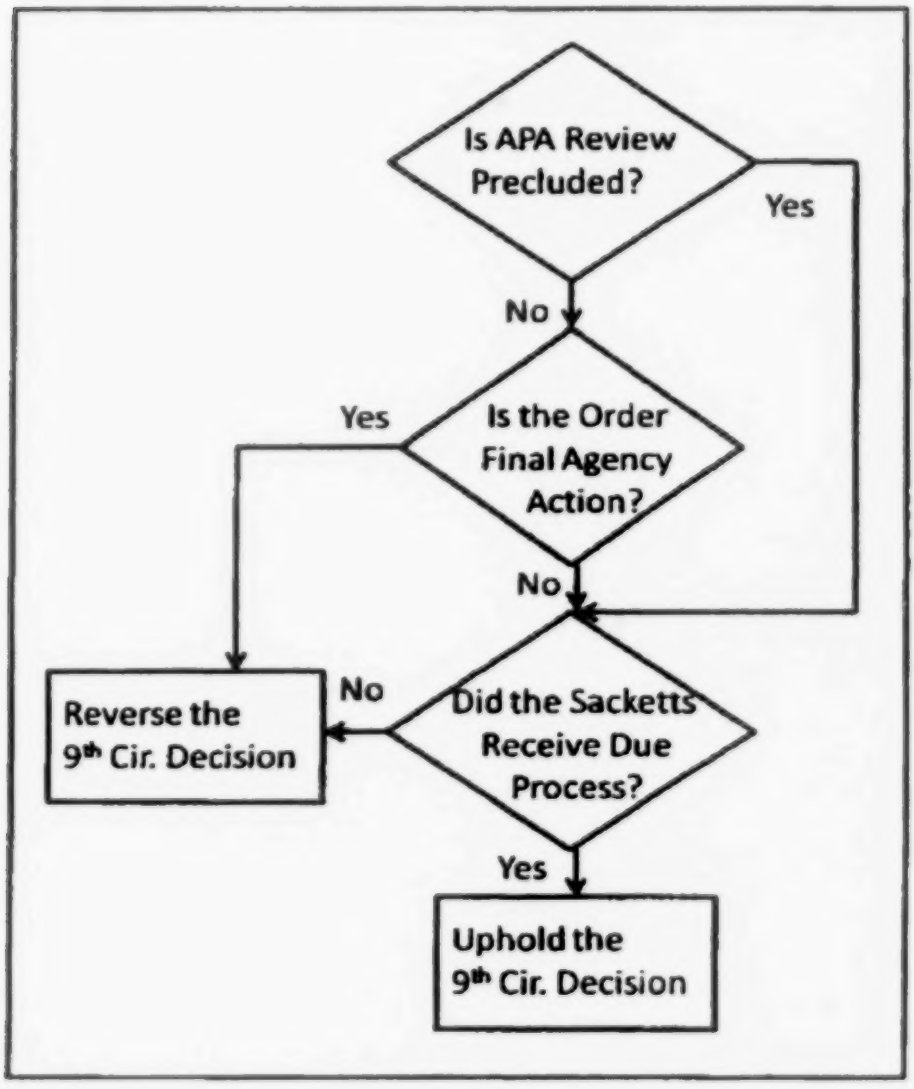
SUMMARY OF ARGUMENT

Straightforward application of two well-accepted principles of statutory construction should guide the Court's analysis. *See Figure* 1. The overriding principle is that constitutional issues should be avoided if the case can fairly be decided on statutory grounds. Also critical is the presumption that the Administrative Procedure Act ("APA") favors judicial review when it is not precluded by statute. With these precepts in mind, *Amici* suggest that the Court may use the following sequential process to decide this case:

- First, the Court should determine whether the Clean Water Act ("CWA") precludes APA judicial review over the Compliance Order issued to the Sacketts. To avoid a constitutional issue, and buttressed by the presumption favoring review, the answer to this question is "no" and APA review should be allowed. But this does not end the statutory inquiry.
- Second, the Court must decide whether the Compliance Order constitutes "final agency action" so as to trigger APA review. The well-accepted test for determining such finality must also be conducted against the backdrop of the constitutional avoidance principle. If EPA's Order is "final agency action," that is the end of the matter. The Sacketts get their day in court and there is no need to reach the constitutional question.
- Finally, *only* if the Court determines that APA review is precluded, or that the Compliance

Order is not a "final agency action," must it review the constitutionality of the process afforded to the Sacketts. Should the Court reach this stage, analysis of the factors established in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) reveals that the Sacketts did not receive due process under the Fifth Amendment. U.S. Const. amend. V.

Figure 1.



ARGUMENT

I. TO AVOID CONSTITUTIONAL QUESTIONS, THE CLEAN WATER ACT SHOULD BE CONSTRUED TO AFFORD JUDICIAL REVIEW TO THE SACKETTS.

A. The Avoidance Principle and the Presumption Favoring APA Judicial Review.

Two simple principles should guide the Court's review of this matter: The avoidance principle and the APA presumption favoring judicial review of final agency decisions.

Under the avoidance principle, "if an otherwise acceptable construction of the statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, [this Court is] obligated to construe the statute to avoid such problems." *Immigration and Naturalization Serv. v. St. Cyr* ("*INS*"), 533 U.S. 289, 299-300 (2001) (internal quotation marks and citations omitted). If there are two permissible constructions of a statute, the Court must choose the interpretation that avoids the unconstitutional result. *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).[2] In this case, a determination that the CWA

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[2] *See also Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs* ("*SWANCC*"), 531 U.S. 159, 173 (2001) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress") (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

allows APA judicial review of the Sacketts' administrative compliance order ("Compliance Order") will avoid the constitutional due process question.

In deciding whether the Sacketts can obtain judicial review, the second construction principle also comes into play: the APA offers a clear presumption favoring judicial review unless precluded by the underlying statute. The APA covers "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, "except to the extent that -- (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." *Id.* § 701(a). Courts have interpreted these provisions to provide a presumption favoring judicial review of final agency decisions. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967) (APA's judicial review provisions should receive "'hospitable' interpretation"). Legislative history of the APA explains:

> Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945).

Nonetheless, the presumption may be overcome by "clear and convincing evidence" that Congress intended to preclude judicial review of certain

actions. *Abbott Labs*, 387 U.S. at 141. A court need not apply the "'clear and convincing evidence' standard in the strict evidentiary sense." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 350 (1984). Instead, a court may determine that Congress intended to preclude review based "not only [on the statute's] express language, but also [on] the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Id.* at 345.

B. The Text of the CWA Does Not Expressly Preclude Judicial Review of EPA Compliance Orders.

Judicial review is precluded where legislation explicitly states that the agency's decisions "shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision." U.S. Dept. of Justice, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, IX Section 10, JUD. REV. at 94 (1947). *See, e.g., Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297 (1943) (Congress intended to preclude judicial review in statute stating "no ... court of the United States shall have jurisdiction to review" certain actions of the Administrator of Veterans' Affairs).

The CWA's text does not expressly foreclose judicial review of administrative compliance orders. Section 509(b)(1) lists seven categories of EPA actions that may be filed in a U.S. Circuit Court of Appeals. 33 U.S.C. § 1369(b)(1). Compliance orders are not on this list, but there also is nothing to

explicitly preclude their review. Likewise, section 309(a) does not expressly preclude judicial review of such orders. 33 U.S.C. § 1319(a). Under this section, EPA has the discretion to either issue an administrative compliance order "on the basis of any information available," *id.* at § 1319(a)(3), or bring a civil enforcement action in U.S. district court "for any violation for which [EPA] is authorized to issue a compliance order." *Id.* at § 1319(b). In short, nothing in the CWA explicitly prevents the suit brought by the Sacketts.[3]

C. Nor Does the CWA's Structure or Intent Preclude Judicial Review of Compliance Orders.

While the CWA expressly states that some EPA actions are amenable to court review without mentioning compliance orders, this alone does not

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[3] By analogy, sections 309(a) and 509(b) are silent concerning challenges to permits issued by the U.S. Army Corps of Engineers under section 404. 33 U.S.C. §§ 1344, 1369(b). Yet, courts routinely accept challenges to section 404 permits under the APA. *E.g. Mich. Peat v. EPA*, 175 F.3d 422, 428 (6th Cir. 1999) (landowner's challenge to conditional section 404 permit was reviewable final agency action); *Nat'l Wildlife Fed'n v. Whistler*, 27 F.3d 1341 (8th Cir. 1994) (reviewing the Corps' issuance of a permit under section 404(b) of the CWA that contained 42 conditions); *Riverside Irrigation Dist. v. Stipo*, 658 F.2d 762, 767 (10th Cir. 1981) (Corps' decision that landowners were not qualified for a nationwide permit was reviewable final agency action); *Bankers Life & Cas. Co. v. Callaway*, 530 F.2d 625, 632 (5th Cir. 1976) (Corps' decision to issue a dredge and fill permit constituted final agency action under the APA and Rivers and Harbors Act); *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97, 102 (2d Cir. 1970) (same).

imply that such orders are shielded from judicial oversight:

> [T]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.

Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 674 (1986) (citations omitted). Moreover, through the lens of the avoidance principle, allowing the Sacketts federal court access would not "severely disrupt [the CWA's] complex and delicate administrative scheme" or undermine Congress's intent. *Block*, 467 U.S. at 348.

The CWA's enforcement provisions were established "to avoid the necessity of lengthy fact finding, investigations, and negotiations," and that administrative compliance orders were intended for cases "based on relatively narrow fact situations requiring a *minimum* of discretionary decision making or delay."[4] S. Rep. No. 92-414, Cong., 2d Sess. at 3730 (1972) (emphasis supplied). Affording judicial review to the Sacketts would not disrupt any "delicate" CWA scheme. From EPA's administrative vantage point, it had decided all that was necessary

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[4] The determination of whether a geographic feature is "waters of the U.S." requires *maximum* agency discretion, especially after the fractured *Rapanos* decision. *Rapanos v. U.S.*, 547 U.S. 715 (2006). Such complicated questions of CWA jurisdiction are plainly *not* "committed to agency discretion *by law*" for purposes of the APA preclusion inquiry under 5 U.S.C. § 701(a)(2) (emphasis supplied).

to effectuate the Act's goals. The Compliance Order targeting the Sacketts made factual and legal conclusions that:

i) Their property contained jurisdictional "waters of the United States;"
ii) They conducted activities that violated federal law; and
iii) They were obliged to complete all of the remedial actions in the Compliance Order by specified deadlines.

App.B1-B11.

Affording the Sacketts federal court access after issuance of a compliance order would not hinder EPA's ability to investigate potential violations or issue an order requiring compliance with the Act.

In truth, *Amici* believe there is nothing pre enforcement about this case. The Sacketts have been the targets of *actual* enforcement actions, investigations, and conclusions made by EPA. The agency's Order unequivocally states that Petitioners violated federal law. App.B6-B7, paras 1.11, 1.13. Most definitely, this is not a case where an agency has refused to take action. Rather, EPA has "exercise[d] its coercive power over an individual's liberty or property rights [which] courts often are called upon to protect," and the Sacketts' Compliance Order is an "action [that] itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers." *Heckler v.*

Chaney, 470 U.S. 821, 832 (1985) (agency decision to not take enforcement action was not subject to APA review).

The CWA's penalty scheme also lends support for judicial review here. EPA is empowered to seek penalties both for violations of the Act and compliance orders. When EPA calculates those penalties, it may adjust them upward if the violator failed to comply with an administrative compliance order. 33 U.S.C. § 1319(d) (penalties for violations of "any order issued by the Administrator" may be adjusted based on the period of noncompliance and "good-faith efforts to comply").[5] Thus, landowners risk more exorbitant penalties for violations of administrative compliance orders if there are impediments to judicial review that delay compliance and extend the noncompliance period.

Accordingly, the CWA's structure does not preclude APA review of compliance orders, but rather its penalty provisions can be fairly construed to favor judicial oversight.

D. Cases Finding Statutory Structures That Foreclosed Judicial Review are Distinguishable.

Block v. Cmty. Nutrition Inst., 467 U.S. 340, 350 (1984), is a leading case where a statute's general scheme contextually precluded judicial review of

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[5] *See also* EPA, INTERIM CLEAN WATER ACT SETTLEMENT PENALTY POLICY, at 3, 12 (Mar. 1, 1995), http://www.epa.gov/compliance/resources/policies/civil/cwa/cwapol.pdf ("*Interim CWA Penalty Policy*") (EPA may seek penalties for "violations of § 309(a) compliance orders" and may adjust them upward if the violator failed to comply with a compliance order).

agency action. The Court would not allow "ultimate consumers of dairy products" to obtain APA review of milk market orders issued under the Agricultural Marketing Agreement Act. 467 U.S. at 341. The act clearly allowed suits challenging milk orders by "handlers" who processed milk products. Because "[t]hese provisions for handler-initiated review make evident Congress' desire that some persons be able to obtain judicial review of the Secretary's market orders," the Court decided that the general consumer public *as a class* did not receive similar opportunities for court access:

> The remainder of the statutory scheme ... makes equally clear Congress' intention to *limit the classes* entitled to participate in the development of market orders. ... Nowhere in the Act, ... is there an express provision for participation by consumers in any proceeding. In a complex scheme of this type, the omission of such a provision is sufficient reason to believe that Congress intended to foreclose consumer participation in the regulatory process. ... *[T]he preclusion issue turns ultimately on whether Congress intended for that class to be relied upon to challenge agency disregard of the law.*"

Id. at 346-47 (emphasis supplied).

The Sacketts, in contrast to the generic milk consumers in *Block*, are a class of one. What other plaintiffs could invoke the APA to test whether EPA's Compliance Order – which applies *only* to *their* property – was "an abuse of discretion," "not in accordance with law," "in excess of statutory

jurisdiction," or "contrary to constitutional right"? 5 U.S.C. §§ 706(2)(A), (B), (C). Guided by the constitutional avoidance principle, the CWA's enforcement regime should not be construed to imply legislative intent that blocks the Sacketts (or similarly situated property owners) from repairing to federal court. *See also Koretoff v. Vilsack*, 614 F.3d 532, 539 (D.C. Cir. 2010) (refusing a "radical interpretation" of *Block* that would "undermine the presumption in favor of judicial review that the Supreme Court has consistently reaffirmed") (citations omitted).

A key factor in the Court's subsequent treatment of *Block* has been whether the structure of the underlying statute provides an administrative process for aggrieved parties to obtain review of the challenged agency action. For example, in *United States v. Fausto*, 484 U.S. 439 (1988), the Civil Service Reform Act was held to preclude judicial review of an agency decision imposing a 30-day suspension of a federal employee who misused a government vehicle. Relying on *Block*, the Court found that the Merit Systems Protection Board was a "structural element" within the act establishing the "primacy ... for administrative resolution of disputes over adverse personnel action," which could be followed by an available appeal from the Board to the Federal Circuit Court of Appeals. *Id.* at 449. Compare this result to *Bowen*, 476 U.S. 667 (1986). In *Bowen*, the Court allowed judicial review to a challenge against the validity of Medicare regulations. The underlying statute's structure did not allow a "fair hearing" by insurance carriers on issues raised by the plaintiffs regarding "'the

legality, constitutional or otherwise, ... [of] regulations relevant to the Medicare program.'" *Id.* at 675-76.

Of course, nothing in the CWA gives the Sacketts an avenue for administrative review of EPA's Order with the promise of ultimate judicial oversight. They can only get to court if the government decides to bring suit or by seeking a CWA permit they believe is illegal in the first place. *Infra* pp. 27-31. The Court, however, "normally [does] not . . . require plaintiffs to 'bet the farm ... by taking the violative action' before testing the validity of the law." *Free Enterp. Fund v. Public Co. Accounting Oversight Bd.*, 130 S.Ct. 3138, 3151 (2010) (citing, *inter alia*, *Ex Parte Young*, 209 U.S. 123 (1908)).

Of course, all of this begs the obvious: Why did Congress fail to expressly provide judicial review of CWA compliance orders? Chronology may provide one answer. The controversies surrounding "waters of the U.S." determinations by EPA were not a paramount regulatory or judicial concern when Section 309 was last amended in 1987, long before the *SWANCC* and *Rapanos* decisions in 2001 and 2006, respectively. In any event, if Congress did indeed have "waters of the U.S." controversies in mind when drafting the CWA's judicial review provisions, either it did not intend to provide court review of administrative compliance orders or it assumed that such review would be available under the APA. The first option raises a constitutional issue: If there is no judicial review of administrative compliance orders, then citizens in the Sacketts' position are deprived due process because they are not provided a meaningful opportunity to contest an

order. The second option avoids a constitutional issue: If an administrative compliance order is a final agency action, then the APA allows judicial review of the order.

In sum, the CWA does not explicitly foreclose judicial review of compliance orders. Furthermore, its statutory structure can be fairly construed in a manner that allows property owner to access the courts (and challenge significant penalties) without hindering EPA's ability to conduct administrative investigations. Applying the avoidance principle to this statutory framework weighs in favor of allowing judicial review of compliance orders that are final agency action.

II. THE EPA'S COMPLIANCE ORDER IS FINAL AGENCY ACTION

Concluding that the CWA does not preclude APA review of the Compliance Order does not end the statutory inquiry or avoid the due process question. The next step is to determine whether the Compliance Order is "final agency action." *Amici* submit that it is.

In *Bennett v. Spear*, this Court established a two-prong test for determining whether an agency action is "final" and subject to judicial review under the APA. *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997). First, the agency action must mark the "consummation" of the agency's decision making process, rather than being merely tentative or interlocutory in nature. Second, the action must be one "by which rights or obligations have been determined, *or* from which legal consequences will flow." *Id.* at 178 (internal quotation marks and

citations omitted). The focus of a "finality" determination is on the practical and legal impacts of the agency action, not the label attached to it. *Abbott Labs v. Gardner*, 387 U.S. 136, 149-50 (1967); *accord F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239 (1980); *Abramowitz v. EPA*, 832 F.2d 1071, 1075 (9th Cir. 1987).

A. The EPA's Action Was Complete.

The EPA's November 26, 2007, Compliance Order[6] begins with EPA's "FINDING AND CONCLUSIONS," follows with an "ORDER" and concludes with "SANCTIONS." Such characterizations are ordinarily made by an agency or court on final disposition following a hearing. In the Sacketts' case there was no hearing or opportunity to submit information and inform EPA's final conclusions. The Agency unilaterally determined that jurisdictional wetlands were present on the Sacketts' property, pollutants had been discharged into those wetlands absent the required permits, and remediation of the site was required. App.B1-B18. There is nothing tentative or unfinished about ordering the Sacketts to halt construction and restore their property. This was EPA's "last word" and final determination that compliance was necessary. *Alaska, Dep't of Envtl. Conservation v. EPA*, 244 F.3d 748, 750 (9th Cir. 2001) ("*Alaska I*") aff'd, 540 U.S. 461 (2004) ("*Alaska II*") (holding that an EPA compliance order represented the agency's "final position on the

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[6] The Compliance Order looked like a Court order, complete with a legal caption and numbered paragraphs.

factual circumstances," with regard to whether the CWA had been violated); *Allsteel, Inc. v. EPA*, 25 F.3d 312, 315 (6th Cir. 1994) (holding that an EPA compliance order was the Agency's "last word" because the order demanded immediate compliance by the regulated party, and the EPA's only remaining option was court enforcement for non-compliance).

The ring of finality is also found in the wording of the Compliance Order and accompanying Restoration Work Plan (RWP). For example, in the "ORDER" section of the Compliance Order, EPA used the word "shall" eighteen times in describing actions it believed the Sacketts had to complete. App.B7-B10. paras. 2.1-2.14. EPA required site remediation by a particular date, follow-up written notification to substantiate completion, and ongoing monitoring. *Id.* The RWP added another layer of finality to the Compliance Order by dictating the seed mix, acceptable deciduous plant species, inches between plantings, and "site...fenc[ing] for the first three growing seasons." App.B12-B16. paras. 1-9. Indeed, the Compliance Order and RWP reflect EPA's "definitive administrative position" on the question of the Sacketts' compliance with the CWA, thus satisfying the first prong of the *Bennett* test. *Alaska II*, 540 U.S. at 482-83; *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591 (9th Cir. 2008).

B. The Compliance Order Determined Rights and Obligations, and Produced Legal Consequences.

In addition to being "final," the EPA's Compliance Order impacted the Sacketts' "rights and obligations" and produced "legal consequences." *Bennett*, 520 U.S. at 178.

The Sacketts own the "bundle of sticks" that make-up their property rights in 1604 Kalispell Bay Rd., Idaho. *United States v. Craft*, 535 U.S. 274, 278 (2002). The practical effect of the Compliance Order is the removal of at least two of those sticks. The Compliance Order effectively required the Sacketts to halt construction of their home at considerable cost of time, money, and other resources. This impacted their right to use their land. *C. Dickman v. Comm'r of Internal Revenue*, 465 U.S. 330, 336 (1984) ("Property is composed of constituent elements and of these elements the right to use the physical thing to the exclusion of others is the most essential and beneficial.") (internal citation omitted).

Furthermore, the Compliance Order deprived the Sacketts another "stick" in their bundle of rights by limiting their ability to freely transfer their property. The Compliance Order dictates "Respondent shall provide any successor in ownership, control, operation, or any other interest in all or part of the Site, a copy of this Order at least 30 days prior to the transfer of such interest." App.B10, para. 2.13. Idaho law provides that any person who transfers real property must disclose all "material matters relating to the physical condition of the property to be transferred...." Idaho Code Ann.

§ 55-2506 (2011). This includes any condition that may affect a prospective purchasers "ability to clear title" and "any other problems, including legal, physical or other" known by the Seller. Idaho Code Ann. § 55-2508 (2011). Thus, should the Sacketts wish to sell their property, they are now obligated to disclose what amounts to a latent defect – the presence of jurisdictional wetlands and a federal compliance order. This negatively impacts both property value and marketable title. *See generally* Jeffrey A. Michael, Raymond B. Palmquist, *Envtl. Land Use Restriction and Prop. Values, in* 11 VT. J. OF ENVTL. L. 437, 747-49 (Issue 3, Spring 2010) (reviewing studies that illustrate the negative impact that wetlands have on a property's value).

Finally, the EPA itself admits it has imposed new obligations on the Sacketts. EPA's May 15, 2008 letter amending the Compliance Order states that "this Amended Compliance Order removes the *obligation* that wetland vegetation be re-planted at the site by July 1, 2008" but does not eliminate the Sacketts remaining restoration obligations. App.A2 (emphasis added). Thus, the Agency recognized that its initial Compliance Order imposed "obligations" on the Sacketts.

The second prong of the Bennett test can also be met when an agency action has "legal consequences." EPA's Compliance Order has several. First, upon issuance, the Sacketts' became subject to civil penalties should they choose to disregard the Compliance Order. In *Alaska I* the question confronted by the Ninth Circuit was whether three EPA administrative compliance orders, which effectively invalidated a Clean Air Act permit and

"prevent[ed] any further construction or modification" of a mining facility, constituted appealable final agency actions. *Alaska I*, 244 F.3d 748, 749-50. This Court adopted the Ninth Circuit's analysis in affirming that the compliance orders were final agency actions subject to review under the *Bennett* test. *Alaska II*, 540 U.S. 461, 483. With respect to the second *Bennett* prong, the Court accepted that the orders created "practical and legal consequences" in the form of "lost costs and *vulnerability to penalties*" if the site operator disobeyed the orders. *Id.* (emphasis added). The legal consequence of the Compliance Order issued to the Sacketts is the same. CWA section 309(d) allows a court to issue penalties of $37,500 against a person that violates a compliance order. 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4 (adjusting the maximum penalty amount for inflation). This authority is confirmed by the cover letter accompanying the Compliance Order. It provides "failure to comply with the Compliance Order may subject you to civil penalties of up to $32,500 per day for each violation, administrative penalties of up to $11,000 per day for each day during which the violation continues or a civil action in Federal court for injunctive relief...." App.B2; *see also* App.A2, A10.

Second, the Compliance Order carries legal consequences in that, unless complied with, it precludes the Sacketts from securing a CWA §404 permit. EPA maintains that the Sacketts can secure judicial review without exposure to potential legal penalties by submitting a §404 permit application to the U.S. Army Corps of Engineers ("Corps") and then requesting review of the permitting decision under

the APA. Brief of Resp'ts Envtl. Prot. Agency, et al. in Opp'n to Certiorari, No. 10-1062 (May 27, 2011) at 10. However, Corps regulations provide that no permit application will be accepted pending resolution of corrective measures detailed in a compliance order. 33 C.F.R. § 326.3(e)(1). Thus, the Sacketts could not conform to the CWA (by obtaining a permit) unless they first complied with EPA's Order.

There are also compounding legal penalties that stem from a violation of the Compliance Order. Penalties started to accrue the day the Order was violated and continue each day until it is satisfied. EPA, REVISED CWA SECTION 404 SETTLEMENT PENALTY POLICY, at 5 (Dec. 21, 2001), *available at* http://www.epa.gov/compliance/resources/policies/civil/cwa/404pen.pdf ("CWA 404 Penalty Policy"). A single day of not correcting the alleged CWA 402 and 404 violations detailed in the Compliance Order carries a civil penalty up to $75,000 -- $37,500 per day per violation for two violations. App.A2, A6, para 1.10; App.B2, B6, para. 1.10; 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4 (adjusting the maximum penalty amount for inflation). One week of non-compliance may inflate the civil penalty to $525,000. The EPA will also consider aggravating and mitigating circumstances before applying an administrative penalty or making penalty recommendations to a court. 33 U.S.C. § 1319(d). For example, a "recalcitrance" adjustment factor is often used to increase a penalty. *CWA 404 Penalty Policy*, at 8, 15 (Dec. 21, 2001); *Interim CWA Penalty Policy*, at 4, 12 (March 1, 1995). Recalcitrance relates to the alleged violators "delay or refusal to

comply with the law, to cease violating, to correct violations, or to otherwise cooperate with regulators once specific notice has been given and/or a violation has occurred." *Id.* at 15 (Dec. 21, 2001).

In the Sacketts' case, the longer the dredged or fill material remain in place, vegetation is not replanted and monitoring reports delayed, the greater the penalty. In some cases, applying the recalcitrance factor may result in a "gravity adjustment of up to 200 percent (200%) of the preliminary gravity amount." *Id.*

* * *

Thus, the EPA's issuance of the Compliance Order was a "final action" that both affected the Sacketts' obligations and had legal consequences. Therefore, under the APA, the EPA's action was a "final agency action" that is judicially reviewable. 5 U.S.C. § 704.

III. THE EPA'S COMPLIANCE ORDER PROCESS VIOLATED THE SACKETTS' RIGHT TO DUE PROCESS.

If the Court determines that the CWA precludes APA review of CWA compliance orders, *or* that the Compliance Order issued in this case is not a final agency action, *then* it must determine whether the government deprived the Sacketts of "life, liberty or property without due process of law." U.S. Const., amend. V.[7] The familiar "two step" due process

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[7] In this matter the Fifth Amendment Due Process Clause is implicated because the federal government deprived the Sacketts of "life, liberty, or property." U.S. Const. amend. V. *Amici* rely on both Fifth and Fourteenth Amendment due

analysis requires the Court to first determine whether the Sacketts held an interest safeguarded by the Fifth Amendment's protection of life, liberty, or property. U.S. Const., amend. V. If so, then it must decide whether the EPA's procedures were "constitutionally sufficient." *Swarthout v. Cooke*, 131 S.Ct. 859, 861 (2011) ("As for the Due Process Clause, standard analysis under that provision proceeds in two steps: We first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient."); *Ingraham v. Wright*, 430 U.S. 651, 672 (1977).

"A fundamental requirement of due process is 'the opportunity to be heard.' It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Furthermore, due process requires that "an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) ("[W]here a State must act quickly, or where it would

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process cases, as the Court has never found that "due process of law" means something different in the two Amendments. *Malinski v. People of State of New York*, 324 U.S. 401, 415 (1945) (J. Frankfuter concurring) ("To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.").

be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause."). It is "the decisionmaker's obligation to inform himself about facts relevant to his decision and to learn the claimant's own version of those facts." *Heckler v. Campbell*, 461 U.S. 458, 471 n.1 (1983) (J. Brennan concurring).

Finally, to determine whether a hearing procedure violates the Due Process Clause, the Court must balance three factors: "the private interest that will be affected;" the "risk of an erroneous deprivation of such interest through the procedures used;" and the Government's interest in the process. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

In this case, the EPA denied the Sacketts of a protectable property interest using a process that fails the *Mathews'* test.

A. The Sacketts Hold a Property Interest Protected by the Due Process Clause.

The Court has long held that an owner of property possesses an interest worthy of protection under the Due Process Clause.

In *Fuentes v. Shevin, et al.*, 407 U.S. 67 (1972), similar statutes in Florida and Pennsylvania allowed for the seizure of goods or chattels in a person's possession under a writ of replevin. *Id.* at 70. In holding that the replevin statutes violated the Fourteenth Amendment, the Court explained that the "Amendment's protection of 'property' . . . has never been interpreted to safeguard *only the rights of undisputed ownership*. Rather, it has been read broadly to extend protection to 'any significant

property interest,' including statutory entitlements." *Id.* at 86. (internal citations omitted) (emphasis added). Thus, the Court concluded that "undisputed ownership" is an interest protected by the Due Process Clause.

Similarly, in *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 572 (1972), a state university dismissed a professor after one year of employment. *Id.* at 566. In resolving whether the professor held a protectable property interest, the Court explained that "property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Id.* at 571-572. Thus, the Court established "ownership" as the baseline property interest protected by the Due Process Clause. *See also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49 (1993) (holding that the plaintiffs home and land were "property interests protected by the due process clause.") (hereinafter *Good*); *Connecticut v. Doehr*, 501 U.S. 1, 10 (1991), explaining that ownership interests affected by attachment "are significant."); *DeBlasio v. Zoning Bd. of Adjustment for the Twp. of West Amwell*, 53 F.3d 592, 600 (3d Cir. 1995) (providing that "ownership is a property interest worthy of substantive due process protection.").

It is undisputed that the Sacketts own the property that the government is attempting to regulate. *Sackett v. U.S. E.P.A.*, 622 F.3d 1139, 1141 (9th Cir. 2010). That ownership interest is plainly a property interest worthy of Due Process protection.

B. The Process Established By the CWA Denied the Sacketts of Due Process.

Since the Sacketts hold a protectable interest, the Court must determine "whether the procedures followed by the [EPA] were constitutionally sufficient." *Swarthout*, 131 S.Ct. at 861. They were not.

1. The CWA Compliance Order Review Process.

Absent APA review, there are basically two avenues in which a recipient of a CWA compliance order can present his side of the story. As neither the CWA, nor the EPA, establishes an administrative hearing process, both avenues lead to court.

Under the first "avenue," a landowner in the Sacketts' position may seek judicial review after submitting to the Corps's section 404 permit application process. *Sackett*, 622 F.3d at 1146 (citing 33 C.F.R. § 331.10; 5 U.S.C. § 704). However, the landowner receives her day in court only *if* she succumbs to possible agency overreach by spending time and money[8] to implement the Order's commands;[9] *if* she spends an average of 788 days

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[8] As illustrated by the RWP, obeying a compliance order will obviously cost the recipient both time and money. App.B12 – B18.

[9] Where the Corps has determined that a landowner filled wetlands without authorization, she must apply for an "after-the-fact" permit. 33 C.F.R. § 326.3(e)(1). It cannot issue such a permit, however, until corrective measures are completed. *Id.* Additionally, the Corps – "exercis[ing] the discretion of an enlightened despot" – will not process the application until the

and $271,596 (excluding mitigation costs and design changes) to complete the section 404 permit application process;[10] *if* the agency denies the permit application;[11] and *if* she exhausts all administrative

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district engineer is satisfied that the landowner has fully restored the wetlands and eliminated any current or future detrimental impacts. *Id.* at § 326.3(e)(1)(i); *Rapanos*, 547 U.S. at 721 (2006) (plurality). The landowner must also agree to toll the statute of limitations. 33 C.F.R. § 326.3(e)(1)(v).

[10] This Court noted that "[t]he average applicant for an individual permit spends 788 days and $271,596," excluding mitigation costs and design changes. *Rapanos*, 547 U.S. at 721 (citing Sunding & Zilberman, *The Econ. of Envtl. Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 74-76 (Winter 2002) (discussing the results of a 1999 survey)). Private and public entities spend an estimated $1.7 billion each year to obtain wetlands permits. *Id.*

[11] Alternatively, if the Corps issues the permit, the landowner may either challenge permit conditions or decline the permit. If no compliance order has been issued, the landowner submits objections to the district engineer, and then appeals to the division engineer if she receives an unfavorable decision. If the appeal is accepted, the reviewing officer examines the record, confers with the parties, and issues a decision. After exhausting administrative remedies, the landowner may appeal the permitting decision to a federal court. 33 C.F.R. §§ 331.1-.12, App. A-B.

This appeal process is further complicated when the landowner must apply for an "after-the-fact" permit. 33 C.F.R. § 331.11. If the district engineer determines that corrective measures have not been "completed to [his] satisfaction," the Corps will not accept the application or a later appeal. *Id.* It is also unclear if the terms of the Compliance Order are "relevant" to the issues in the appeal process or that they may be raised in district court if they have been deemed irrelevant in the administrative appeal process.

remedies.[12] Only *then* the landowner is afforded a hearing to challenge the agency's decision denying the permit that she believes was not required. *See Sackett*, 622 F.3d at 1146. The Ninth Circuit assumed that a landowner may then challenge both the permit decision and the Compliance Order.

But, even if the landowner successfully challenges the agency's permitting decision (or proves that it had no authority to issue the order), she has forfeited the substantial cost and time to comply with the Order, complete the permit application process, wait for a decision on the permit, and litigate the agency's unlawful exercise of authority – delaying the legitimate and preferred use of her property.

More importantly, the Ninth Circuit overlooked that this "avenue" to judicial review is typically not available to landowners in the Sacketts' position. When the EPA has taken the lead in enforcement and issued a compliance order, the landowner may not access the Corps's administrative appeal process for permitting decisions. 33 C.F.R. § 331.11 (the administrative appeal process is unavailable "if the unauthorized activity is the subject of a referral to the Department of Justice or the EPA, or for which the EPA has the lead enforcement authority or has requested lead enforcement authority."). Thus, in reality, the Sacketts could only obtain a hearing if

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[12] The Ninth Circuit incorrectly notes that a permit denial is "immediately appealable to a district court under the APA." *Sackett*, 622 F.3d at 1146. Corps regulations require the landowner to first exhaust all administrative remedies. 33 C.F.R. §§ 331.10, 331.12.

the government filed an action under section 309. 33 U.S.C. § 1319.

Under the second "avenue," the landowner can obtain a hearing if the government files[13] an action under Section 309(b). 33 U.S.C. § 1319(b). However, under this avenue, the landowner receives her day in court only *if* the agency refers the matter to the Department of Justice (DOJ) for civil or criminal enforcement;[14] *if* (and *when*) the DOJ files a civil or criminal complaint in federal court; and *then* she can present her version of the facts and law in a federal district court. Of course, if she has disregarded the Compliance Order, then she has risked prison time and hundreds of thousands of dollars in civil and criminal fines.[15] Conversely, if she obtains judicial review having complied with the Order, then she may have spent time and money, and altered her property to learn that the Agency never had jurisdiction.

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[13] Under this avenue, it is the government that controls the timing and substance of the hearing. Thus, in reality it is the government's hearing, not the recipient's.

[14] Alternatively, the agency could choose to impose administrative penalties, in which case the landowner also must exhaust administrative remedies before judicial review is available. 33 C.F.R. §§ 331.10, 331.12.

[15] In the *Rapanos* litigation, for example, Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines for filling wetlands on his property without a permit. *United States v. Rapanos*, 235 F.3d 256, 260 (6th Cir. 2000).

In sum, to obtain review, the recipient of a CWA compliance order may either (1) disregard[16] or comply with it, and wait for the government to bring an action seeking civil or criminal penalties, or (2) comply with the order, submit to the government's permitting process and later challenge the agency's permit decision. *Sackett*, 622 F.3d at 1146-47. This is not a constitutionally adequate process.

2. Application of the Mathews' Factors.

To determine if the EPA provided the Sacketts with a constitutionally sufficient process, the Court must balance three factors:

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Application of these factors to the CWA compliance

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[16] Any person who violates the CWA is potentially subject to penalties of $37,500 per day. 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4. The Ninth Circuit noted that civil penalties are "committed to judicial, not agency, discretion." *Sackett*, 622 F.3d at 1146. But the court ignored that, under the civil penalty provision, the landowner risks more ruinous penalties by ignoring the compliance order and waiting for her day in court. 33 U.S.C. § 1319(d) (allowing an upward penalty adjustment for the "economic benefit" of delayed compliance and reflecting "good-faith efforts to comply"); *Interim CWA Penalty Policy* (Mar. 1, 1995) at 3, 12; *CWA 404 Penalty Policy* (Dec. 21, 2001) at 15.

order review process confirms that the Sacketts were denied due process.

a. The Sacketts' Interest v. The Government's Interest.

The "private interest that will be affected" factor weighs strongly in favor of a determination that the process the Sacketts were afforded violated their right to due process. The "right to maintain control" over one's property "and to be free from governmental interference, is a private interest of historic[al] and continuing importance." *Good*, 510 U.S. 43, 53-54 (1993); *Fuentes*, 407 U.S. at 81 (providing that in the United States we place a "high value . . . on a person's right to enjoy what is his, free of governmental interference."). The Sacketts wished to build a home[17] on their private property. *Sackett*, 622 F.3d at 1141. The EPA, however, required the Sacketts to alter their land and refrain from putting it to their desired use. Thus, the Sacketts were denied important ownership rights, such as the right to unrestricted use and enjoyment, and the right to occupy. *Good*, 510 U.S. at 53-54.

In addition, property owners like the Sacketts have an interest in a prompt hearing because, faced

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[17] *See Silverman v. United States*, 365 U.S. 505, 512 (1961) ("'A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. . . . A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.'" (quoting *United States v. On Lee*, 193 F.2d 306, 315-316 (2d Cir. 1951) (dissenting opinion))).

with an order, they must decide whether to disregard it, or comply. Under the current process, ignoring the order could cost them up to $75,000 per day per violation. *Supra* p. 22. Therefore, compliance order recipients who believe the government is incorrect have an interest in a "prompt post-deprivation procedures" to keep the penalties from multiplying. *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 241 (1988).

Furthermore, should a landowner comply with a CWA compliance order and obtain a hearing under either avenue for review, that suit will not include a claim for damages.[18] Thus, should the court determine that no CWA violation existed, "this determination, coming months after" the initial order would not make compliance order recipients whole. *See Good*, 510 U.S. at 56 (quoting *Doehr*, 501 U.S. at 15.). Thus, recipients of CWA compliance orders have an interest in a prompt hearing so that they are not deprived of the time and money spent complying with an order that was erroneously issued.

The government may claim it has a legitimate interest in ensuring that the "waters of the United States" are not illegally degraded. The EPA's "general interest" in clean water, however, is not the issue in this case. *Id.* at 58 (providing that the government interest was whether the government

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[18] Under the Federal Tort Claims Act a person may obtain monetary damages from the federal government for the wrongful act of a government employee. 28 U.S.C. §1326(b). However, before bringing suit, the claimant must comply with the administrative procedures established in 28 U.S.C. § 2675.

needed to seize property before a hearing). The question is whether the government has an interest in a procedure that delays review of a compliance order until after the recipient complies with the order and submits to lengthy and expensive permit process.

There is certainly no reason to have the recipients of compliance orders wait for judicial review, which could take months, if not years. *See Good*, 510 U.S. at 56 (stating that because of the "congested civil docket" a property owner may not receive a hearing for "many months."). As the language of this Compliance Order confirms, the EPA had determined the facts, concluded that the Sacketts violated the law, and commanded that they take action to alter their property. *See supra* p.11. There was nothing more for the government to do. Thus, allowing the Sacketts to have a hearing would not disrupt the government's procedures. *See Barry v. Barachi*, 443 U.S. 55, 66 (1979) (explaining that there was no State interest in an "appreciable delay in going forward with a full hearing."). Therefore, this factor also weighs in favor of a determination that the Sacketts were denied due process of law.

b. The Risk of Erroneous Deprivation.

Finally, the Court must review the risk that the current process erroneously deprived the Sacketts' of their interests, and the value that additional procedures would provide. *Mathews*, 424 U.S. at 335. This final *Mathews*' factor also weighs against the constitutionality of the process afforded to the Sacketts.

First, the current process certainly provides a risk of erroneous deprivation to a person that receives a CWA compliance order. "Risk" can be separated into two components—the magnitude of the injury and the probability of such injury. *See United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) (Judge Hand explaining that a duty is created when the burden is less than the probability multiplied by the magnitude.) Compliance orders can cause considerable injuries to recipients and unfortunately have an unacceptable high likelihood of being incorrectly issued.

For example, if a recipient of a compliance order decides to disregard it and moves forward with his project, he risks the possibility of losing the capital expended on the project, the cost of restoring the property, and penalties of $37,500 per day per violation while waiting for the government to initiate an action under section 1319(b) and for the court to make a decision. Similarly, if he decides to comply,[19] he risks the cost of restoring the property under the terms of the order and the permitting costs; just to later be found innocent of any wrongdoing. Therefore, whether the recipient of a CWA compliance order either complies with or ignores it, the magnitude of potential loss is very high.

Similarly, the EPA can issue a compliance order based on "any information available." 33 U.S.C. § 1319(b). Such information could include "a staff report, newspaper clipping, anonymous phone tip or

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[19] *Amici* submit that faced with possible penalties of $37,500 per day, a majority of people will comply with the type of order that the EPA issued to the Sacketts.

anything else . . . ." *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1241 (11th Cir. 2003). The CWA does not require the Administrator to substantiate the information or conduct its own investigation, nor does it require that any legal conclusions be made by an attorney. Therefore, the reliability of compliance orders that are based on "any information" can certainly be questioned.

Moreover, one basis for issuing the Compliance Order in this case was the EPA's belief that the property in question was a "navigable water" and therefore a "water of the United States." 33 U.S.C. § 1362(7) (defining "navigable waters" as "waters of the United States."). It is an understatement to say that the meaning of this term is far from clear. *See e.g.*, *"Navigable Waters of the United States:" A Call for Transparency, Clarity, and Uniformity*, 9 LOY. MAR. L.J. 1, 21 (2011) (the combination of case law, statutory definitions and government regulations "have caused significant confusion over what types of wetlands are covered by the CWA."); Andrew L. Fono and Russ Krauss, *Jurisdictional Wetlands and Mitigation Banking in Texas, How the Water looks Today*, 48-APR Hou. Law. 16, 21 (2011) (explaining that the definition of jurisdictional wetlands is a "stable uncertainty.")

For example, in *Rapanos v. United States*, 547 U.S. 715, 720, 730 (2006), the Court addressed whether two separate wetlands (one and eleven miles from traditionally navigable waters, respectively) were "navigable waters". Unfortunately, "no opinion command[ed] a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act." *Id.* at

758 (C.J. Roberts concurring). Thus, even this Court, with a complete record and two lower court opinions, found it difficult to determine whether a geographic feature falls within CWA jurisdiction.

Furthermore, the EPA and Corps have struggled to determine which features are within their jurisdiction. Since *Rapanos*, the Agencies have developed two separate guidance documents interpreting the term "waters of the United States," and they are currently finalizing a third. In the latest draft guidance, the Agencies explain that "the extent of waters over which the agencies assert jurisdiction under the CWA will increase compared to the extent of waters over which jurisdiction has been asserted under existing guidance . . . ." *Draft Guidance on Identifying Waters Protected by the Clean Water Act*, 3 (2011), http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf (last visited Sept. 16, 2011). Hence, even though Congress has not changed the definition of the term "navigable waters" since 1972, the Agencies are now reinterpreting the term to increase their jurisdiction. If the Agencies' headquarters are unclear of their jurisdiction, compliance orders based on that jurisdiction can certainly be called into doubt.

Thus, the penalties and possible lost capital associated with CWA compliance order are ruinous, and there is a considerable possibility that the government's basis for issuing them is unfounded. Therefore, the risk of erroneous deprivation is high.

Finally, additional procedures could certainly mitigate some of the risk. Much of the "magnitude"

component occurs due to timing—penalties and the cost of compliance add up while waiting months if not years for judicial review. Furthermore, as compliance orders are based on "any information," additional procedures that would test the accuracy and reliability of that information would increase the likelihood that they are not erroneously issued.

Therefore, because additional procedures would mitigate the high risk of erroneous deprivation, the final *Mathews'* factor also weighs against the constitutionality of the current process.

* * *

Accordingly, being property owners, the Sacketts had a considerable interest in using and controlling their private property and the risk that the government had mistakenly deprived them of that interest is unacceptable high. Furthermore, it would have been a small burden on the government to provide the Sacketts with an opportunity to "present [their] side of the story." *Goss v. Lopez*, 419 U.S. 565, 581-82 (1975). Thus, on balance, the three *Mathews'* factors weigh against the constitutionality of the process the government afforded the Sacketts. Consequently, if the Court determines that the EPA's Compliance Order was not reviewable under the APA, it should find that the EPA deprived the Sacketts of due process in violation of the Fifth Amendment.

CONCLUSION

For the reasons state above, the Court should reverse the decision of the U.S. Court of Appeals for the Ninth Circuit.

DATED: September 30, 2011

Respectfully submitted,

Duane Desiderio
THE REAL ESTATE ROUNDTABLE
Market Square West
801 Pennsylvania Ave., N.W. , Suite 720
Washington, D.C. 20004

John J. McDermott
NATIONAL APARTMENT ASSOCIATION
4300 Wilson Blvd,
Suite 400
Arlington, VA 22203

Thomas J. Ward*
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NATIONAL ASSOCIATION OF HOME BUILDERS
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Washington, D.C. 20005
(202) 866-8200
tward@nahb.org
* *Counsel of Record*

APPENDIX

Sackett, Amended Administrative Compliance Order ..... App. A1

Sackett, Administrative Compliance Order ..... App. B1

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101.3140

Reply to: ETPA-083

May 15, 2008

SENT VIA CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Chantell and Michael Sackett
P. O. Box 425
Nordman, ID 83848-0368

Re: **In *the Matter of Chantell and Michael Sackett* Amended Administrative Compliance Order, EPA Docket No. CW A-10-2008-0014**

Dear Mr. and Ms. Sackett:

With this letter, the U.S. Environmental Protection Agency (EPA) is issuing an amended administrative compliance order ("Amended Compliance Order") that supersedes and replaces the order issued to you on November 26, 2007. The Amended Compliance Order is issued pursuant Sections 308 and 309(a) of the Clean Water Act, 33 U.S.C. §§ 1318 and 1319(a). EPA is issuing this order in connection with the unauthorized placement of fill material into wetlands at your property located

at 1604 Kalispell Bay Road near Kalispell"Creek, Bonner County, Idaho ("Site").

It has become apparent that the amended dates for compliance detailed in my letter to you dated May 1, 2008, may not result in successful establishment of revegetated wetland species at the Site because of the short growing season in northern Idaho. Please note that this Amended Compliance Order removes the obligation that wetland vegetation be re-planted at the Site by July 1, 2008. In addition, the Amended Compliance Order extends the date for removal of fill material and replacement of original wetland soils to October 31, 2008 (ahead of the winter season when removal of fill material and replacement of wetland soils would be infeasible). Since replanting will not be required in the 2008 growing season, there is no need to require the immediate removal of fill material. This Amended Compliance Order will account for the ecological constraints in northern Idaho and will also remove the need for immediate judicial resolution of EPA's motion to dismiss the complaint (Case No. CV-08-0185-EJL) you filed on April 28, 2008.

Successful compliance with the Amended Compliance Order does not preclude EPA from bringing a formal enforcement action for penalties or further injunctive relief to address the Clean Water Act violations associated with your property located at the Site. Please also be aware that failure to comply with the Amended Compliance Order may subject you to civil penalties of up to $32,500 per day for each violation, administrative penalties of up to

$11,000 per day for each day during which the violation continues or a civil action in Federal court for injunctive relief, pursuant to Section 309 of the CWA, 33 U.S.C. §1319.

Should you have any questions concerning this matter, please have your attorney contact Mr. Ankur Tohan directly at 206-553-1796.

Sincerely,

/s/ Richard B. Parkin
Richard Parkin, Acting Director,
Office of Ecosystems, Tribal,
and Public Affairs

cc: H. Reed Hopper, Pacific Legal Foundation
Damien Schiff, Pacific Legal Foundation
Leslie Weatherhead, Witherspoon, Kelley,
Davenport & Toole
Greg Taylor, ID Dept. of Water Resources
Beth Reinhart, U.S. Army Corps of Engineers

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

In the Matter of:	)	
	)	
CHANTELL AND	)	
MICHAEL SACKETT	)	DOCKET NO.
	)	CWA-10-2008-0014
	)	
Bonner County, Idaho	)	AMENDED
	)	COMPLIANCE
	)	ORDER
	)	
Respondents.	)	
	)	

The following FINDINGS AND CONCLUSIONS are made and ORDER issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by sections 308 and 309(a) of the Clean Water Act ("the Act"), 33 U.S .C. §§ 1318 and 1319(a). This authority has been delegated to the Regional Administrator, Region 10, and has been duly redelegated to the undersigned Director of the Office of Ecosystems, Tribal and Public Affairs. This AMENDED COMPLIANCE ORDER ("Order") supersedes and replaces the Compliance Order issued under Docket Number CWA-10-2008-0014 to Respondents on November 26 2007.

I. FINDINGS AND CONCLUSIONS

1.1 Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into waters of the United States by any person, except as authorized by a permit issued pursuant to section 402 or 40 of the Act, 33 U.S.C. §§ 1342 or 1344. The unpermitted discharge of any pollutant from a point source constitutes a violation of section 301 (a) of the Act, 33 U.S.C. § 1311(a). Section 502(12), 33 U.S.C. § 1362(12), defines the term "discharge of any pollutant" to include "any addition of any pollutant to navigable waters from any point source." "Navigable waters" are defined as "waters of the United States." 33 U.S.C. § 1362(7).

1.2 Respondents Chantell and Michael Sackett (hereinafter collectively "Respondents") are "persons" within the meaning of Sections 301(a) and 502(5) of the Act, 33 U.S.C. §§ 1311(a) and 1362(5).

1.3 Respondents own, possess, or control real property identified as 1604 Kalispell Bay Road near Kalispell Creek, Bonner County, Idaho; and located within Section 12, Township 60 North, Range 5 West, Boise Meridian ("Site"). The Site is adjacent to Priest Lake, and bounded by Kalispell Bay Road on the north and Old Schneider Road on the south.

1.4 The Site contains wetlands within the meaning of 40 C.F.R. § 230.3(t) and 33 C.F.R. § 328.3(b); and the wetlands meet the criteria for jurisdictional wetlands in the 1987 "Federal Manual for Identifying and Delineating Jurisdictional Wetlands."

1.5 The Site's wetlands are adjacent to Priest Lake within the meaning of 40 C.F.R. § 230.3(s)(7) and 33 C.F.R. § 328.3(a)(7). Priest Lake is a "navigable water" within the meaning section 502(7) of the Act, 33 U.S.C. § 1362(7), and "waters of the United States" within the meaning of 40 C.F.R. § 232.2.

1.6 In April and May, 2007, at times more fully known to Respondents, Respondents and/or persons acting on their behalf discharged fill material into wetlands at the Site. Respondents filled approximately one half acre.

1.7 Upon information and belief, Respondents and/or persons acting on their behalf used heavy equipment to place the fill material into the wetlands. The heavy equipment used to fill these waters is a "point source" within the meaning of section 502(14) of the Act, 33 U.S.C. § 1362(14).

1.8 The fill material that Respondents and/or persons acting on their behalf caused to be discharged included, among other things, dirt and rock, each of which constitutes a "pollutant" within the meaning of section 502(6) of the Act, 33 U.S.C. § 1362(6).

1.9 By causing such fill material to enter waters of the United States, Respondents have engaged, and are continuing to engage, in the "discharge of pollutants" from a point source within the meaning of sections 301 and 502(12) of the Act, 33 U.S.C. §§ 1311 and 1362(12).

1.10 Respondents' discharges of dredged and/or fill material was not authorized by any

permit issued pursuant to section 402 or 404 of the Act, 33 U.S.C. §§ 1312 or 1314.

1.11 Respondents discharge of pollutants into waters of the United States at the Site without a permit constitutes a violation of section 301 of the Act, 33 U.S.C. § 1311.

1.12 As of the effective date of this Order, the fill material referenced in Paragraph 1.6 above remains in place.

1.13 Each day the fill material remains in place without the required permit constitutes an additional day of violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

1.14 Taking into account the seriousness of this violation and Respondents' good faith efforts to comply with applicable requirements, the schedule for compliance contained in the following Order is reasonable and appropriate.

II. ORDER

Based upon the foregoing FINDINGS AND CONCLUSIONS and pursuant to sections 308 and 309(a) of the Clean Water Act, 33 U.S.C. §§ 1318 and 1319(a), it is hereby ORDERED as follows:

2.1 In compliance with the Clean Water Act, Respondents shall remove all unauthorized fill material placed within wetlands located at Section 12, Township 60 North, Range 5 West, Boise Meridian ("Site"). The removed fill material is to be moved to a location approved by the EPA representative identified in Paragraph 2.8. To the maximum extent practicable, the Site shall be restored to its original, pre-disturbance topographic

condition with the original wetlands soils that were previously removed from the Site. Acceptable reference topographic conditions exist on wetlands immediately adjacent to and bordering the Site.

2.2 Compliance activities described under Paragraph 2.1 must be completed no later than **October 31, 2008.**

2.3 At least 48 hours prior to commencing compliance activity on the Site, Respondents shall provide verbal notification to the EPA representative identified in Paragraph 2.8.

2.4 Within 7 days of completion of the compliance activities under Paragraph 2.1, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.8. The written notification shall include photographs of Site conditions prior to and following compliance with this Order.

2.5 Upon receipt of the notification referenced under Paragraph 2.4, EPA may schedule an inspection of the Site by EPA or its designated representative

2.6 Respondents shall provide and/or obtain access to the Site and any off-Site areas to which access is necessary to implement this Order; and shall provide access to all records and documentation related to the conditions at the Site and the restoration activities conducted pursuant to this Order. Such access shall be provided to EPA employees and/or their designated representatives, who shall be permitted to move freely at the site and

appropriate off-site areas in order to conduct actions that EPA determines to be necessary.

2.7 EPA encourages Respondents to engage in informal discussion of the terms and requirements of this Order. Such discussions should address any questions Respondents have concerning compliance with this Order. In addition, Respondents are encouraged to discuss any allegations herein which Respondents believe to be inaccurate or requirements which may not be attainable and the reasons why. Alternative methods to attain the objectives of this Order may be proposed. If acceptable to EPA, such proposals may be incorporated into amendments to this Order at EPA's discretion. After compliance with the requirements of this Order, Respondents are also encouraged to contact the EPA representative identified in Paragraph 2.8 to discuss restoration of the Site to its pre-disturbance, vegetative condition.

2.8 All submissions and notifications required by this Order shall be sent to:

John Olson
U.S. EPA, Idaho Operations Office
1435 North Orchard Street
Boise, ID 83706
Phone: (208) 378-5756
Fax: (208) 378-5744.

2.9 Prior to the completion of the terms of this Order, Respondents shall provide any successor in ownership, control, operation, or any other interest in all or part of the Site, a copy of this Order at least 30 days prior to the transfer of such interest. In addition, Respondents shall simultaneously notify

the EPA representative identified in Paragraph 2.8 in writing that the notice required in this Section was given. No real estate transfer or real estate contract shall in any way affect Respondent's obligation to comply fully with the terms of this Order.

2.10 This Order shall become effective on the date it is signed.

III. SANCTIONS

3.1 Notice is hereby given that violation of, or failure to comply with, the foregoing Order may subject Respondents to (1) civil penalties of up to $32,500 per day of violation pursuant to section 309(d) of the Act, 33 U.S.C. § 1319(d), and 40 C.F.R. Part 19; (2) administrative penalties of up to $11,000 per day for each violation, pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g), and 40 C.F.R. Part 19; or (3) civil action in federal court for injunctive relief, pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b).

///

///

///

3.2 Nothing in this Order shall be construed to relieve Respondents of any applicable requirements of federal, state, or local law. EPA reserves the right to take enforcement action as authorized by law for any violation of this Order, and for any future or past violation of any permit issued pursuant to the Act or of any other applicable legal requirements, including, but not limited to, the violations identified in Part I of this Order.

Dated this 15th day of May, 2008

/s/ Richard B. Parkin

RICHARD PARKIN, Acting Director
Office of Ecosystems, Tribal and Public Affairs

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

Reply to
Attn Of: ETPA-083

SENT VIA CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Chantell and Michael Sackett
P.O. Box 425
Nordman, ID 83848-0368

Re: ***In the Matter of Chantell and Michael Sackett***
Administrative Compliance Order, EPA Docket No. CWA-10-2008-0014

Dear Mr. and Mrs. Sackett:

Enclosed is an administrative compliance order ("Compliance Order") issued to you pursuant to Sections 308 and 309(a) of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1318 and 1319(a). The U.S. Environmental Protection Agency ("EPA") is issuing this order in connection with the unauthorized placement of fill material into wetlands at your property located at 1604 Kalispell Bay Road near Kalispell Creek, Bonner County, Idaho ("Site"). The Compliance Order requires you to perform specified restoration activities and provide certain specified

information. It incorporates a Scope of Work for a Restoration Work Plan that includes specific elements for removal of the unauthorized fill, restoration of the site, time frames, and monitoring.

Please note that successful completion of the work required by the enclosed Compliance Order does not preclude EPA from bringing a formal enforcement action for penalties or further injunctive relief to address the CWA violations associated with your property located at the Site. Please also be aware that failure to comply with the Compliance Order may subject you to civil penalties of up to $32,500 per day for each violation, administrative penalties of up to $11,000 per day for each day during which the violation continues or a civil action in Federal court for injunctive relief, pursuant to Section 309 of the CWA, 33 U.S.C. §1319.

Please review the enclosed Compliance Order and Scope of Work, and contact Mr. John Olson at (208) 378-5756, if you have any technical questions concerning this order. If you have any legal questions concerning the order, then please contact Ankur Tohan, Assistant Regional Counsel, at (206) 553-1796, or ask your attorney to contact Mr. Tohan, if you are represented by counsel.

Sincerely,

/s/ Michelle Pirzadeh
Michelle Pirzadeh, Director
Office of Ecosystems,
Tribal and Public Affairs

cc: Greg Taylor, ID Dept. of Water Resources
Beth Reinhart, U.S. Army Corps of Engineers

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

In the Matter of:	)	
	)	DOCKET NO.
CHANTELL AND	)	CWA-10-2008-0014
MICHAEL SACKETT	)	
Bonner County, Idaho	)	
	)	
	)	
Bonner County, Idaho	)	
	)	COMPLIANCE
	)	ORDER
Respondents.	)	
	)	

The following FINDINGS AND CONCLUSIONS are made and ORDER issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by sections 308 and 309(a) of the Clean Water Act ("the Act"), 33 U.S.C. §§ 1318 and 1319(a). This authority has been delegated to the Regional Administrator, Region 10, and has been duly redelegated to the undersigned Director of the Office of Ecosystems, Tribal and Public Affairs.

I. FINDINGS AND CONCLUSIONS

1.1 Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into waters of the United States by any person, except as authorized by a permit issued pursuant to section 402 or 404 of the Act, 33 U.S.C. §§ 1342 or 1344. The unpermitted discharge of any pollutant from a point source constitutes a violation of section 301(a) of the Act, 33 U.S.C. § 1311(a), Section 502(12), 33 U.S.C. § 1362(12), defines the term "discharge of any pollutant" to include "any addition of any pollutant to navigable waters from any point source." "Navigable waters" are defined as "waters of the United States." 33 U.S.C. § 1362(7).

1.2 Respondents Chantell and Michael Sackett (hereinafter collectively "Respondents") are "persons" within the meaning of Sections 301(a) and 502(5) of the Act, 33 U.S.C. §§ 1311(a) and 1362(5).

1.3 Respondents own possess, or control real property identified as 1604 Kalispell Bay Road near Kalispell Creek, Bonner County, Idaho; and located within Section 12, Township 60 North, Range 5 West, Boise Meridian ("Site"). The Site is adjacent to Priest Lake, and bounded by Kalispell Bay Road on the north and Old Schneider Road on the south.

1.4 The Site contains wetlands within the meaning of 33 C.F.R. § 328.4(8)(b); the wetlands meet the criteria for jurisdictional wetlands in the 1987 "Federal Manual for Identifying and Delineating Jurisdictional Wetlands."

1.5 The Site's wetlands are adjacent to Priest Lake within the meaning of 33 C.F.R. § 328.4(8)(c). Priest Lake is a "navigable water" within the meaning of section 502(7) of the Act, 33 U.S.C. §

1362(7), and "waters of the United States" within the meaning of 40 C.F.R § 232.2.

1.6 In April and May, 2007, at times more fully known to Respondents, Respondents and/or persons acting on their behalf discharged fill material into wetlands at the Site. Respondents filled approximately one half acre.

1.7 Upon information and belief, Respondents and/or persons acting on their behalf used heavy equipment to place the fill material into the wetlands. The heavy equipment used to fill these waters is a "point source" within the meaning of section 502(14) of the Act, 33 U.S.C. § 1362(14).

1.8 The fill material that Respondents and/or persons acting on their behalf caused to be discharged included, among other things, dirt and rock, each of which constitutes a "pollutant" within the meaning of section 502(6) of the Act, 33 U.S.C.§ 1362(6).

1.9 By causing such fill material to enter waters of the United States, Respondents have engaged, and are continuing to engage, in the "discharge of pollutants" from a point source within the meaning of sections 301 and 502(12) of the Act, 33 U.S.C. §§ 1311 and 1362(12).

1.10 Respondents' discharges of dredged and/or fill material was not authorized by any permit issued pursuant to section 402 or 404 of the Act, 33 U.S.C. §§ 1312 or 1314.

1.11 Respondents discharge of pollutants into waters of the United States at the Site without a

permit constitutes a violation of section 301 of the Act, 33 U.S.C. § 1311.

1.12 As of the effective date of this Order, the fill material referenced in Paragraph 1.6 above remains in place.

1.13 Each day the fill material remains in place without the required permit constitutes an additional day of violation of Section 301(a) of the Act, 33 U.S.C. § 1311 (a).

1.14 Taking into account the seriousness of this violation and Respondents' good faith efforts to comply with applicable requirements, the schedule for compliance contained in the following Order is reasonable and appropriate.

II. ORDER

Based upon the foregoing FINDINGS AND CONCLUSIONS and pursuant to sections 308 and 309(a) of the Clean Water Act, 33 U.S.C. §§ 1318 and 1319(a), it is hereby ORDERED as follows:

2.1 Respondents shall immediately undertake activities to restore the Site in accordance with the Restoration Work Plan, as detailed in the "Scope of Work." Attachment 1.

2.2 Fill shall be removed and wetland soil returned no later than **April 15, 2008**.

2.3 At least 48 hours prior to commencing removal activity on the Site, Respondents shall provide verbal notification to the EPA representative identified in Paragraph 2.12 below.

2.4 Within 3 days of completion of the earthmoving work, Respondents shall notify, in

writing, the EPA representative identified in Paragraph 2:12 below. The written notification shall include photographs of Site conditions prior to and following earthmoving activities.

2.5 Upon receipt of the notification referenced under Paragraph 2.4 above, EPA will schedule as promptly as possible an inspection of Site by EPA or its designated representative.

2.6 Respondents shall complete re-planting the Site by **April 30, 2008**.

2.7 Respondents shall provide and/or obtain access to the Site and any off-Site areas to which access is necessary to implement this Order; and shall provide access to all records and documentation related to the conditions at the Site and the restoration activities conducted pursuant to this Order. Such access shall be provided to EPA employees and/or their designated representatives, who shall be permitted to move freely at the site and appropriate off-site areas in order to conduct actions that EPA determines to be necessary.

2.8 Within 7 days of completion of replanting work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 below.

The written notification shall include photographs of Site conditions prior to and following re-planting.

2.9 Upon receipt of the notification referenced under Paragraph 2.8 above, EPA will schedule as promptly as possible with Respondents an inspection of Site by EPA or its designated representative.

2.10 Failure to timely and appropriately implement to EPA's satisfaction any removal activities or conditions specified above or under the Restoration Work Plan shall be deemed a violation of this Order.

2.11 EPA encourages Respondents to engage in informal discussion of the terms and requirements of this Order upon receipt. Such discussions should address any allegations herein which Respondents believe to be inaccurate or requirements which may not be attainable and the reasons why. Alternative methods to attain the objectives of this Order may be proposed. If acceptable to EPA, such proposals may be incorporated into amendments to this Order at EPA's discretion.

2.12 All submissions, and notifications required by this Order shall be sent to:

John Olson
U.S. EPA, Idaho Operations Office
1435 North Orchard Street
Boise, ID 83706
Phone: (208) 378-5756
Fax: (208) 378~5744

2.13 Prior to the completion of the terms of this Order, including the attached Scope of Work, Respondents shall provide any successor in ownership, control, operation, or any other interest in all or part of the Site, a copy of this Order at least 30 days prior to the transfer of such interest. In addition, Respondents shall simultaneously notify the EPA representative identified in Paragraph 2.12 in writing that the notice required in this Section was given. No real estate transfer or real estate contract shall in any way affect Respondent's obligation to comply fully with the terms of this Order.

2.14 This Order shall become effective on the date it is signed.

III. SANCTIONS

3.1 Notice is hereby given that violation of, or failure to comply with, the foregoing Order may subject Respondents to (1) civil penalties of up to $32,500 per day of violation pursuant to section 309(d) of the Act, 33 U.S.C. § 1319(d), and 40 C.F.R. Part 19; (2) administrative penalties of up to $11,000 per day for each violation, pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g), and 40 C.F.R. Part 19; or (3) civil action-in federal court for injunctive relief, pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b).

3.2. Nothing in this Order shall be construed to relieve Respondents of any applicable requirements of federal, state, or local law. EPA reserves the right to take

enforcement action as authorized by law for any violation of this Order, and/or any future or past violation of any permit issued pursuant to the Act or of any other applicable legal requirements, including, but not limited to, the violations identified in Part I of this Order.

Dated this 26th day of November, 2007

/s/ Michelle Pirzadeh
MICHELLE PIRZADEH,
Director
Office of Ecosystems, Tribal and Public Affairs

Attachment 1

SCOPE OF WORK
RESTORATION WORK PLAN
1604 Kalispell Bay Road near Kalispell Creek,
Bonner County, Idaho
Section 12, Township 60 North, Range 5 West,
Boise Meridian

Chantell and Michael Sackett ("Respondents")
P.O.Box 425
Nordman, ID 83848-0368

EPA Docket No. CWA-10-2008-0014

I. Introduction

In order to restore the area impacted by the unauthorized discharge of fill material into waters of the United States, Respondents shall remove all Unauthorized fill material placed within wetlands located at Section 12, Township 60 North, Range 5 West, Boise Meridian ("Site"). To the maximum extent practicable, the Site shall be restored to its' original, pre-project topographic and vegetative condition. The original vegetative condition at the Site was mature palustrine scrub-shrub wetland with a high diversity of native plants. Acceptable reference conditions exist on the adjacent wetland.

To this end, Respondents and/or their agent(s) shall implement this Restoration Work Plan, as referenced in Section II of the Compliance Order ("Order").

II. **Restoration activities**

1. **Remove all unauthorized fill at the Site (after providing verbal notification to the EPA representative identified in Paragraph 2.12 of the Order, at least 48 hours in advance of fill removal activity). Fill removal shall be accomplished from the fill area and no work shall take place with equipment in the adjacent wetland. Removed fill shall be disposed of in an approved upland site.**

2. **Return all wetland soil that was previously removed from the Site. Level the soil to the pre-project elevations on the Site.**

3. **Notify (in writing) the EPA representative identified in Paragraph 2.12 of the Order within 3 days of completion of the earthmoving work. The written notification shall include photographs of Site conditions prior to and following earthmoving activities.**

4. **Fill shall be removed and wetland soil returned no later than April 15, 2008 (see schedule below). After removal, and prior to planting, Respondents shall notify the EPA representative identified in Paragraph 2.12 of the Order so that an inspection of the site can be conducted to determine if fill removal and soil placement has been successful.**

Attachment 1.

5. The entire Site shall be planted with container stock of native scrub-shrub, broad-leaved deciduous wetland plants and seeded with native herbaceous wetland plants. Plantings shall include the species which were removed from the Site. Trees and tall shrub species shall be planted approximately 10 feet apart on center over the entire Site. Fast growing, native perennial woody species common to wetland areas of northern Idaho shall be incorporated into the plantings. Acceptable species include: red-osier dogwood (*Cornus stolonifera*), Douglas hawthorne (*Crataegus douglasii*), white alder (*Alnus incana*), paper birch (*Betula papyrifera*), larch (*Larix occidentalis*) and western red cedar (*Thuja plicata*). Low shrub species shall be planted approximately 18-24 inches apart on center over the entire site. Acceptable species include Douglas' spirea (*Spiraea douglasii*) and Wood's rose (*Rosa woodsii*). The entire site shall be seeded with an herbaceous seed mix of acceptable species: *Carex interior* (Inland sedge), *Carex rostrata* (Beaked sedge), *Carex aquatilis* (Water sedge), *Juncus balticus* (Baltic rush), *Pentaphylloides floribunda* (shrubby cinquefoil), *Deschampsia caespitosa* (tufted hairgrass), and *Phleum pratense* (common timothy).

6. The seed mix and container stock shall be obtained from a local or regional source, and shall consist of appropriately-sized container stock to ensure success of the restoration (e.g.,

10 cubic inch containers or larger for woody and herbaceous species).

7. Seeding and planting shall be completed no later than **April 30, 2008**. Within 7 days of completion of re-planting work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 in the Order. The written notification shall include photographs of Site conditions prior to and following re-planting.

8. The Site shall be fenced for the first three growing seasons.

9. The following conditions shall be followed during restoration of the area to ensure violations of the state water quality standards do not occur:

   - Removal of fill and planting will be conducted in such a manner so as to minimize turbidity and comply with Idaho Water Quality Standards and Wastewater Treatment Requirements.
   - All fuel, oil and other hazardous materials will be stored arid equipment refueled away from the wetland.
   - All areas subject to erosion as a result of fill removal and planting will be protected by suitable methods of erosion control. These measures shall include but not be limited to applying mulch to all exposed soils.

- The use of fertilizers, pesticides, and herbicides will be consistent with label instructions.

Attachment 1

III. Monitoring activities

1. Monitoring of vegetation on the restored Site for survival and ground coverage shall be performed in October 2008, June 2009, October 2009, and October 2010.

2. Successful restoration shall require 75% of groundcover established under native wetland species. Any replanted woody and herbaceous plants that are included in the 75% criterion must have survived at least two complete growing seasons. Flexibility of the performance standard may be allowed based on the best professional judgment of U.S. EPA personnel's evaluation of current site conditions, and a demonstration of good faith efforts by Respondents to maintain the health and condition of the restored wetland within that three-year period.

3. A monitoring report shall be prepared and submitted to EPA within 30 days of each prescribed monitoring event. The report shall include photographic evidence as well as monitoring results. All photographs must be labeled with the date, location, and point of reference (e.g., facing north and looking at southern edge of Site). In addition, the monitoring report shall identify any problems discovered and recommend appropriate

corrective action(s) to ensure the success of restoration. If monitoring reports show that vegetation survival is not adequate to meet the success criteria, Respondents shall provide EPA a plan to achieve restoration at the Site. EPA may require modifications to the plan prior to its approval and implementation.

IV. Inspection activities

1. The property owner shall notify, and allow for inspections by, EPA personnel or their designated agent after completion of fill removal activities, after completion of planting activities, whenever any corrective action(s) are proposed, and after monitoring indicates that the criteria for success have been attained.

Attachment 1

VI. Schedule

1. The Restoration Plan shall be designed to accomplish restoration in accordance with the following schedule:

Action	Commence-ment No Later Than	Completion No Later Than
Fill shall be removed and wetland soil returned	April 1, 2008	April 15, 2008[1]
EPA or its representative conducts an inspection of Site	As soon as possible after notification	Prior to planting
Re-Planting of the entire Site	April 15, 2008	April 30, 2008[2]
Monitoring of the entire Site	October 1, 2008	October 31, 2008
Monitoring of the entire Site	June 1, 2009	June 31, 2009
Monitoring of the entire Site	October 1, 2009	October 31, 2009
Monitoring of the entire Site	October 1, 2010	October 31, 2010

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1 At least 48 hours prior to commencing removal activity on the Site, Respondents shall provide verbal notification to the EPA representative identified in Paragraph 2.12 of the Order. Within 3 days of completion of the earthmoving work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 of the Order. The written notification shall include photographs of Site conditions prior to and following earthmoving activities.

2 Within 7 days of completion of re-planting work, Respondents shall notify, in writing, the EPA representative identified in Paragraph 2.12 of the Order. The written notification shall include photographs of Site conditions prior to and following re-planting.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
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RECORD
AND
BRIEFS

IN THE

Supreme Court of the United States

CHANTELL SACKETT AND
MICHAEL SACKETT,
Petitioners

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, ET AL.,
Respondents

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF *AMICUS CURIAE* OF NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. May petitioners seek pre-enforcement judicial review of the administrative compliance order pursuant to the Administrative Procedure Act. 5 U. S. C. §704?

2. If not. does petitioners' inability to seek pre-enforcement judicial review of the administrative compliance order violate their rights under the Due Process Clause?

Amicus curiae National Association of Manufacturers will address the second question.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 9

I. THE CLEAN WATER ACT, AS INTERPRETED BY THE NINTH CIRCUIT, DEPRIVES CITIZENS OF DUE PROCESS OF LAW 9

TABLE OF CONTENTS (cont'd)

Page

II. THE CWA DEPRIVES RECIPIENTS OF COMPLIANCE ORDERS OF THE RIGHT TO DUE PROCESS BECAUSE A RECIPIENT SUFFERS AN IMMEDIATE DEPRIVATION OF PROTECTED PROPERTY INTERESTS WHETHER OR NOT SHE COMPLIES WITH AN ORDER 19

a. The "emergency situation" exception does not apply 24

III. A BALANCING OF PRIVATE AND GOVERNMENT INTERESTS REQUIRES A PRE-DEPRIVATION HEARING BEFORE A NEUTRAL DECISION-MAKER 25

a. The Private Interest 27

b. The Government Interest 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases

Abbott Laboratories v. Gardner,
421 U.S. 560 (1975) 6, 7

Armstrong v. Manzo, 380 U.S. 545 (1965) 24

Bd. of Regents of State Colls. v. Roth,
408 U.S. 564 (1972) 23

Block v. Community Nutrition Institute,
467 U.S. 340 (1984) 6

Boddie v. Connecticut, 401 U. S. 371 (1971) . . 24

Bowen v. Academy of Family Physicians,
476 U.S. 667 (1986) 7

Calero-Toledo v. Pearson Yacht Leasing Co.,
416 U.S. 663 (1974) 23

Citizens to Preserve Overton Park, Inc.
v. Volpe, 401 U.S. 402 (1971) 6

TABLE OF AUTHORITIES (cont'd)

Page

Cases

Cleveland Bd. of Educ. v. Loudermill,
470 U.S. 532 (1985) 21

Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.,
508 U.S. 602 (1993) 13-14

Connecticut v. Doehr,
501 U.S. 1 (1991) 10, 20, 29

Crane v. Comm'r, 331 U.S. 1 (1947) 10, 20

Edward J. DeBartolo Corp. v. *Florida Gulf Coast Bldg. & Constr. Trades Council*,
485 U.S. 568 (1988) 18

Ex Parte Young, 209 U.S. 123 (1908) 14

Fuentes v. Shevin,
407 U.S. 67 (1972) 13, 21, 22, 28

TABLE OF AUTHORITIES (cont'd)

Page

Cases

Gilbert v. Homar, 520 U.S. 924 (1997) 24

Goldberg v. Kelly, 397 U.S. 254 (1970)) 13

Hackett v. U.S. EPA,
622 F.3d 1139 (9th Cir. 2010) . . . . . *passim*

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) . 13-14

Heckler v. Chaney, 470 U.S. 821 (1985) 6

INS v. Chadha, 462 U.S. 919 (1983) 28

INS v. *St. Cyr*, 533 U.S. 289 (2001) 18

Japan Whaling Ass'n v. Cetacean Soc'y,
478 U.S. 221 (1986) 7

Lindahl v. Office of Personnel Management,
470 U.S. 768 (1985) 7

TABLE OF AUTHORITIES (cont'd)

Page

Cases

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 22

Mathews v. Eldridge,
424 U.S. 319 (1976) 21, 26, 27, 28

MedImmune, Inc. v. Genentech, Inc.,
549 U.S. 118 (2007) 14

Peralta v. Heights Med. Ctr., Inc.,
485 U.S. 80 (1988) 20

Rapanos v. United States,
547 U.S. 715 (2006) 11-12, 17

Tennessee Valley Authority v. Whitman,
336 F.3d 1236 (11th Cir. 2003)
cert. denied, 541 U.S. 1030 (2004) . 8, 15, 16, 18

Thunder Basin Coal Co. v. Martin,
969 F.2d 970 (10th Cir. 1992) 17

TABLE OF AUTHORITIES (cont'd)

Page

Cases

Thunder Basin Coal Co. v. Reich,
510 U.S. 200 (1994) 9, 12, 14, 16, 17, 29

United States v. James Daniel Good Real Prop., 510 U.S. 43 (1993) 21, 23, 29

United States v. Fausto, 484 U.S. 439 (1988) . . 6

Zinermon v. Burch, 494 U.S. 113 (1990) 23

Statutes

Administrative Procedure Act ("APA"),
5 U.S.C. § 701(a)(1)) 6

5 U.S.C. § 701(a)(2) 6

5 U.S.C. § 706(2)(A) (1988) 3

Clean Air Act,
42 U.S.C. § 7413(a) (Supp. III 1991) 5

TABLE OF AUTHORITIES (cont'd)

Page

Statutes

Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9606(a) (1988) 5

Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 801, *et seq.* 16

Judiciary and Judicial Procedure, 28 U.S.C. § 2462 12

Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1311 (1988) . 13

33 U.S.C. § 1318 2

33 U.S.C. § 1319 5

33 U.S.C. § 1319(a) 2, 8

33 U.S.C. § 1319(c) 8, 13

TABLE OF AUTHORITIES (cont'd)

Page

Statutes

33 U.S.C. § 1319(d) 8

33 U.S.C. § 1319(g) 13

Safe Drinking Water Act,
42 U.S.C. § 300g-3(g) 5

§ 300h-2(c) (1988) 5

Solid Waste Disposal Act (Resource
Conservation and Recovery Act),
42 U.S.C. § 6928 (1988) 5

Regulations and Rules

33 C.F.R. §§ 331.10, 331.12 13

Fed.R.Civ.P. 12(b)(1) 4

Fed.R.Civ.P. 59(e) 4

INTEREST OF AMICUS[1]

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to United States' economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

Many of NAM's members have been, or potentially will be, subject to administrative orders issued by the Environmental Protection Administration ("EPA") under statutes which

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. Copies of those consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

authorize EPA to issue administrative orders as an enforcement measure.

STATEMENT OF THE CASE

Petitioners Chantell and Michael Sackett ("the Sacketts" or "Petitioners") own a 0.63-acre undeveloped lot in Idaho near Priest Lake. In April and May of 2007, the Sacketts filled in about one half acre of that property with dirt and rock in preparation for building a house. *Sackett v. U.S. E.P.A.*, 622 F.3d 1139, 1141 (9th Cir. 2010); Petitioners' Appendix to their Petition for Certiorari (hereafter "Pet.App.") A-2.

On November 26, 2007, the EPA issued a compliance order ("Order") against the Sacketts. The Order alleged that the Sacketts' parcel is a wetland subject to the Clean Water Act ("CWA") pursuant to sections 308 and 309(a) of the Water Pollution Control Act (Clean Water Act) ("CWA" or the "Act"), 33 U.S.C. §§ 1318 and 1319(a) (1988). The Order charged that the Sacketts had violated section 301 of the CWA, 33 U.S.C. § 1311, by discharging fill material into regulated waters without first obtaining a permit and required the Sacketts to remove the fill material and restore the wetlands, and set a schedule for the removal of the

fill material and replanting of vegetation in the "disturbed area." 622 F.3d at 1141; Pet. App. A-2-A-3.

The Order further stated that "[v]iolation of, or failure to comply with, the foregoing Order may subject Respondents to (1) civil penalties of up to $32,500 per day of violation[2] . . . [or] (2) administrative penalties of up to $11,000 per day for each violation." 622 F.3d at 1141; Pet.App. A-3.

The Sacketts sought a hearing with the EPA to challenge the finding that the Parcel is subject to the CWA. EPA did not grant the Sacketts a hearing and continued to assert CWA jurisdiction over the Parcel. 622 F.3d at 1141; Pet.App. A-3.

The Sacketts then filed an action in the United States District Court for the District of Idaho seeking injunctive and declaratory relief. They challenged the compliance order as (1) arbitrary and capricious under the Administrative Procedure Act("APA"), 5 U.S.C. § 706(2)(A); (2) issued without a hearing in violation of the Sacketts' procedural due process rights; and (3) issued on the basis of an "any information

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[2] As noted *supra*, n. 4, the maximum per-day penalty amount increased to $37,500 effective January 12, 2009. 40 C.F.R. § 19.4. *See* 622 F.3d at n.3 ; Pet. App. A-5.

available" standard that is unconstitutionally vague. 622 F.3d at 1141; Pet.App. A-3.

The district court granted the EPA's Fed.R.Civ.P. 12(b)(1) motion to dismiss the Sacketts' claims for lack of subject-matter jurisdiction, concluding that the CWA precludes judicial review of compliance orders before the EPA has started an enforcement action in federal court. The Sacketts filed a Fed.R.Civ.P. 59(e) motion for clarification and reconsideration that was also denied. 622 F.3d at 1141; Pet App. A-3-4.

The Sacketts appealed the dismissal to the Ninth Circuit. Despite the general presumption of judicial review of administrative actions, that court held that "the Clean Water Act precludes pre-enforcement judicial review of administrative compliance orders, and that such preclusion does not violate due process." 622 F.3d at 1141; Pet. App. A-2.

SUMMARY OF ARGUMENT

Many environmental laws, including the specific law at issue in this case, the Clean Water Act, 33 U.S.C. § 1319, authorize the EPA to issue compliance orders to alleged violators of those

laws.[3,4] Refusal to obey a compliance order is a violation of each respective statute, and subjects parties who disobey the compliance order to severe civil and criminal penalties.

Unless the party receiving a compliance order can obtain judicial review of the compliance order, the alleged violator cannot challenge the order until the EPA commences an enforcement action, by which time substantial penalties – as much as $37,500 *per day* -- can accrue.[5] The dynamics of this scheme effectively coerce the alleged violator

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[3] A compliance order "is a document served on the violator, setting forth the nature of the violation and specifying a time for compliance with the Act." (Pet. App. A4, citation omitted). Violation of a compliance order carries the potential for significant civil or even criminal sanctions. *See* 622 F.3d at 1141; Pet.App. A-3; Pet.App. G-7.

[4] *See also* Clean Air Act, 42 U.S.C. § 7413(a) (Supp. III 1991); Solid Waste Disposal Act (Resource Conservation and Recovery Act), 42 U.S.C. § 6928 (1988); Safe Drinking Water Act, 42 U.S.C. §§ 300g-3(g), 300h-2(c) (1988); Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9606(a) (1988).

[5] The Amended Compliance Order in this case (Pet. App. G1, *et seq.*), dated May 15, 2008, recites that civil penalties of up to $32,500 per day of violation will accrue (Pet. App. G-7), but the maximum per-day penalty amount increased to $37,500 effective January 12, 2009. 40 C.F.R. § 19.4. (*See* Pet. App. A-5).

into compliance, whatever the merits of the claim of violation underlying the order.

Several courts of appeal which have addressed the issue, including the Ninth Circuit in this case, have ruled that judicial review of compliance orders is not available, based on the doctrines of statutory preclusion and "finality" or "ripeness." Without judicial review, the compliance order may become an instrument of intimidation, denying the object of the compliance order due process.[6]

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[6] Courts applying "statutory preclusion" have held that the environmental statute authorizing the compliance order precludes judicial review. (*See* Pet. App. A6-A7). Under the Administrative Procedure Act (APA), judicial review of agency action is limited by the extent to which the relevant statute precludes review. 5 U.S.C. § 701(a)(1) (1988). The APA also denies judicial review if the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). For application of the "committed to agency discretion" provision, *see Heckler v. Chaney*, 470 U.S. 821 (1985), and *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). This Court has applied both explicit and implied statutory preclusion. *See Block v. Community Nutrition Institute*, 467 U.S. 340 (1984). In the case of compliance orders, the lower courts have construed the history, structure, and language of the relevant statute to imply an intent by Congress to preclude direct actions challenging compliance orders. However, even post-*Block*, a number of this Court's decisions suggest that the "clear and convincing standard" of *Abbott Laboratories v. Gardner*, 421 U.S. 560 (1975) is still the standard. *See, e.g.*, *United States v. Fausto*, 484 U.S. 439, 452 (1988)

Pre-enforcement access to the courts is a critical check on agency abuse of the enforcement process and to protect the recipient from the practical effects of threatened penalties. Without judicial review at the time the order is issued, the recipient faces a dilemma: either comply with the order at substantial expense and perhaps irreversible injury to the recipient's property and liberty rights, or risk the potential imposition of heavy penalties for noncompliance if the order is sustained in a subsequent EPA enforcement action. EPA's decision whether and when to bring an enforcement action is entirely discretionary, and delay by the agency will result in accrual of massive monetary penalties.

("Congress will be presumed to have intended judicial review of agency action unless there is persuasive reason' to believe otherwise."); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) (a cause of action for review of agency action is available "absent some clear and convincing evidence of legislative intention to preclude review."); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) ("We begin with the strong presumption that Congress intends judicial review of agency action."); *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 778 (1985) ("We have often noted that only upon a showing of clear and convincing evidence 'of a contrary legislative intent' should the courts restrict access to judicial review." (quoting *Abbott Laboratories v. Gardner*, 421 U.S. 560, 568 (1975)).

The text of the enforcement provision, "any person who violates any order issued by the Administrator under [33 U.S.C. § 1319(a)], shall be subject to a civil penalty . . . for each violation." 33 U.S.C. § 1319(d), suggests that Respondents (as they are designated in the Order (*see* (Pet. App. G-1, *et seq.*)), risk substantial financial penalties for violating the Order, even if they did not violate the CWA, if the EPA establishes in an enforcement proceeding that the compliance order was validly issued based on "any information available." *See Tennessee Valley Authority v. Whitman*, 336 F.3d 1236, 1259 (11th Cir. 2003), *cert. denied*, 541 U.S. 1030 (2004).

In this case, the Ninth Circuit found that to obtain a judicial hearing the Sacketts could either (I) apply for a permit to discharge pollution into the navigable waters of the United States (at substantial cost), and then seek judicial review if a permit were denied (but with no prospect of recovering the costs of any such application), or (ii) ignore the Order, and run the risk of immense fines and possibly even criminal prosecution[7], and

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[7] Criminal penalties are available under 33 U.S.C. § 1319(c).

contest the compliance order in an enforcement action.

This "intolerable choice" (*Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994)) violates the constitutional requirements of due process of law.

ARGUMENT

I.

THE CLEAN WATER ACT, AS INTERPRETED BY THE NINTH CIRCUIT, DEPRIVES CITIZENS OF DUE PROCESS OF LAW

The Sacketts have been undeniably denied a property interest. They purchased a residential lot in a residential neighborhood for the purpose of building a home. They have been denied the right to build a home on their property for years, and perhaps in perpetuity. EPA has already determined that preparing the land for the building of a home involves discharge of pollution into the navigable waters of the United States.

This Court recognized long ago that "property" defined in the "ordinary, everyday sense[]" is not only the tangible "thing which is the subject of

ownership" but also "the owner's [intangible] right to control and dispose of that thing." *Crane v. Comm'r*, 331 U.S. 1, 6 (1947).[8] The Order in this case required Respondents to "provide any successor in ownership, control, operation, or any other interest in all or part of the Site, a copy of this Order at least 30 days prior to the transfer of such interest. In addition, Respondents shall simultaneously notify the EPA representative identified in Paragraph 2.8 in writing that the notice required in this Section was given. No real estate transfer or real estate contract shall in anyway affect Respondent's obligation to comply fully with the terms of this Order" (Pet. App. G-6), thus effectively proscribing the sale or mortgaging

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[8] Any argument that the issuance of an Order does not amount to a deprivation of an important right is belied by *Connecticut v. Doehr*, 501 U.S. 1 (1991), which makes it clear that it is not only the physical seizure of property that deprives a person of possession and use of the property, but that impairment of the right to use or dispose of the property is also a constitutionally recognized deprivation. In his concurring opinion, Justice Rehnquist emphasized the Courts unanimous recognition that the pre-judgment attachment statute in *Doehr* does not deprive the defendant of the use or possession of the property. *Doehr*, 501 U.S. at 26 (Rehnquist, J., concurring). Justice Rehnquist noted that "a lienor need not obtain possession or use of real property belonging to a debtor in order to significantly impair its value to him. *Id.* at 28.

of the property, or at least severely reducing its sale or loan value.

An Order thus causes an immediate, unavoidable, and substantial pre-hearing deprivation of constitutionally protected property interests, whether the Respondent complies with the Order or not.

Further, it cannot be disputed that a Respondent who complies with an Order suffers deprivations through the costs imposed by the Order. These deprivations occur prior to any hearing and are substantial.

Contrary to the Ninth Circuit's suggestion (*see* 622 F.3d at 1146; Pet.App. A-13) that Recipients can vindicate their rights through the permitting process, under EPA regulations the Recipient of an Order cannot even apply for a permit because once an Order has been issued "[n]o permit application will be accepted" until the Compliance Order has been resolved. 33 C.F.R. § 326.3(e)(1)(ii). Thus Recipients cannot avail themselves of this option without expending substantial sums. Moreover, the costs and delays inherent in the permit application process are prohibitive: the average application for an individual permit costs $271,596 and takes more than two years to be issued. *See Rapanos v. United States*, 547 U.S. 715, 721 (2006)

(plurality opinion). Furthermore, there is no certainty that the permit would be granted, or, if granted, not be burdened with impracticable or economically unreasonable conditions.

Further, if a Recipient then had to sue to have her objections heard by a court, and the court ruled that the EPA's Order was factually incorrect or beyond EPA's jurisdiction, the Recipient would not be able to recover the permit application costs.[9]

Alternatively, a Recipient could refuse to comply with the Order and seek to raise their defenses when the EPA sued to enforce it. That course entails incurring EPA fines of as much as $1,250,000 per month, or $13,500,000 per year, for failure to comply with the Order. The Recipient must await EPA's commencement of an enforcement action, which EPA can file at its sole discretion as late as five years after the date of the "violation" (*see* 28 U.S.C. § 2462) while the penalties accumulate. If EPA delayed filing the enforcement action for even a year or two, the accumulated penalties would be enough to

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[9] As Justice Scalia recognized in *Thunder Basin Coal Co. v. Raich*, 510 U.S. 200, 220-21 (1994)(concurring in part and concurring in the judgment), "[C]omplying with a regulation later held to be invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs."

bankrupt even the truly wealthy.[10] Moreover, under the CWA, the Recipient runs the risk of criminal liability as well, as Section 1319(c)(1)-(2) imposes criminal penalties for knowing violations of the Act. *See* 622 F.3d at 1144; Pet.App. A-4.[11] It

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[10] These horrific numbers are not purely imaginary or hypothetical, given the typical time a federal court case takes from filing to judgment and exhaustion of appeals.

[11] EPA could impose administrative penalties, in which case the property owner also must exhaust administrative remedies before judicial review is available. 33 U.S.C. § 1319(g); 33 C.F.R. §§ 331.10, 331.12. When the EPA assesses an administrative penalty, the alleged violator is entitled to "a reasonable opportunity to be heard and to present evidence," the public is entitled to comment, and any assessed penalty is subject to immediate judicial review. 33 U.S.C. § 1319(g)(4), (8). *See* 622 F.3d at 1142; Pet.App. A-4. However, the initial hearing would be before the same person or entity that imposed the penalty, not a neutral decision-maker. The constitutional requirement of some kind of hearing means, at a minimum, that the affected individual must have a meaningful opportunity to present his case before a neutral decision maker. *Fuentes v. Shevin*, 407 U.S. 67, 83 (1972) and *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970)). "Before one may be deprived of a protected interest ... one is entitled as a matter of due process of law to an adjudicator who is not in a situation which would offer a possible temptation to the average man as a judge ... which might lead him not to hold the balance nice, clear and true." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617-18 (1993); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) ("due process requires a neutral and detached

is not certain that in an enforcement action a court would permit the Recipient to raise defenses to the Compliance Order, a "right" the Ninth Circuit read into the CWA, when the plain language of the statute unambiguously precludes it, nor is there any assurance that a later court in such an enforcement action would disallow or substantially reduce any fine on equitable grounds.[12]

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judge in the first instance") (quoting *Concrete Pipe*). Even if the procedure for appeal of a civil penalty were constitutionally adequate, that is not the path the EPA chose in this case.

[12] This Court ruled in *Ex Parte Young*, 209 U.S. 123, 148 (1908) that requiring a party to bear "the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts" would be unconstitutional because it would effectively "close up all approaches to the courts." Recently, this Court again ruled in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) that "Given this genuine threat of enforcement, we did not require, as a prerequisite to testing the validity of the law in a suit for injunction, that the plaintiff bet the farm, so to speak, by taking the violative action." *See also Thunder Basin*, 510 U.S. at 216, where this Court concluded that lack of judicial review is unconstitutional where "the practical effect of coercive penalties for noncompliance is to foreclose all access to the courts," and where "compliance is sufficiently onerous and coercive penalties sufficiently potent."

The impossible choices faced by a Recipient are similar to those the Eleventh Circuit in *TVA v. Whitman, supra,* found the EPA's Compliance Order procedure under a completely analogous provision of the Clean Air Act to be an unconstitutional violation of the Due Process Clause. In *TVA v. Whitman*, the EPA issued a Compliance Order against the Tennessee Valley Authority (TVA) under the Clean Air Act. The Eleventh Circuit recognized that compliance orders have the force of law independent of the statute, and impose liabilities for their violation apart from the statute. Thus the language of the CAA provided no basis for the TVA to challenge the compliance order and raise defenses to it. The Eleventh Circuit recognized that enforcement of the Compliance Order would involve an unconstitutional infringement of the Due Process Clause.[13]

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[13] Respondents recognize that the reasoning of *TVA* decimates their argument. They note that "[i]n *TVA*, the Solicitor General filed a petition for a writ of certiorari on behalf of EPA, arguing that the court in a suit to enforce a CAA compliance order may inquire into the validity of the order. . . .This Court denied the petition. 541 U.S. 1030 (2004)." Brief for the Respondents in Opposition [to the petition in this case], at 13, n.3. Although Respondents allude to "differences" in the statutory language of CWA

The Ninth Circuit recognized that the same problem arises in the present case. If the Sacketts want to challenge the Compliance Order rather than comply with it, they would bear penalties for violating it. But the Ninth Circuit reasoned that the statutory language was not "a model of clarity," and could be interpreted to avoid unconstitutionality by reading into the statute a right for the Sacketts to raise their defenses to the Compliance Order after the EPA moved for enforcement.

The Ninth Circuit's reliance on *Thunder Basin* is misplaced. The Ninth Circuit failed to recognize critical distinctions between *Thunder Basin* and this case, and between the procedures under the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 801, *et seq.* (the "Mine Act") and those the Ninth Circuit determined are available under the CWA. In *Thunder Basin* the mine operator sought judicial review of "an anticipated citation and penalty." *Thunder Basin*, 510 U.S. at 206, even before the Mine Safety and Health Administration ("MSHA") district manager had sent a letter instructing the operator to

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and the Clean Air Act at issue in *TVA*, they do not explain what those differences may be, or how they affect the applicability of *TVA*'s holding to this case.

comply with the Mine Act. *Id.* at 205. This case concerns a deprivation of property rights prior to any hearing: the Sacketts received an Order that already made findings of fact, reached conclusions of law and imposed a "remedy" requiring them to undertake expensive remediation of their property before they sought judicial intervention.

Moreover, the procedure under the Mine Act at issue in *Thunder Basin* is quite different from the process a Recipient is afforded by the CWA. Under the Mine Act, a mine operator may challenge an order within 30 days of receipt, receive a hearing before an independent administrative law judge, 30 U.S.C. § 815(a), and thereafter appeal to the Federal Mine Safety and Health Review Commission. *Thunder Basin Coal Co. v. Martin*, 969 F.2d 970, 973 (10th Cir. 1992) (internal citations omitted). After exhausting these administrative remedies, the operator can then appeal "to a United States court of appeals . . . ." *Id.* As interpreted by the Ninth Circuit, the CWA requires a property owner who receives an order either to comply with the order, submit a permit application, wait for the government to process the permit application, and issue a decision on the application, within EPA's time frame (which, as this Court said in *Rapanos*, *supra*, can exceed two

years), and then seek judicial review, or to wait for the government to file an enforcement action (which can be anytime within five years of issuance of the Order (see *supra* at 12).

The Ninth Circuit invoked the maxim that statutes should be construed, if possible, to avoid substantial constitutional questions is a sufficient ground for rejecting petitioners' interpretation. *See Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001). 622 F.3d at 1145; Pet.App.. We submit that as the Eleventh Circuit explained, "no canon of statutory interpretation can trump the unambiguous language of a statute." *TVA*, 336 F. 3d at 1255, and because the language of the CWA is not ambiguous, its meaning cannot be stretched to avoid the unconstitutional deprivation of due process of law.

Even if the Ninth Circuit were at liberty to construe the statute in a manner inconsistent with its unambiguous language, that court's interpretation does not cure the constitutional infirmity of deprivation of due process by denial of any pre-deprivation review by an impartial decision-maker.

II.

THE CWA DEPRIVES RECIPIENTS OF COMPLIANCE ORDERS OF THE RIGHT TO DUE PROCESS BECAUSE A RECIPIENT SUFFERS AN IMMEDIATE DEPRIVATION OF PROTECTED PROPERTY INTERESTS WHETHER OR NOT SHE COMPLIES WITH AN ORDER

A major flaw in the Ninth Circuit's reasoning is that it completely ignores the fact that a Recipient who complies with an Order suffers deprivations through the costs imposed by the Order, that these deprivations are unquestionably substantial, and occur prior to any hearing.

A Recipient who believes an Order is unlawful and elects not to comply is immediately burdened by a massive contingent liability that has a correspondingly immediate impact on the Recipient's ability to transfer title to the property or to finance the property and the cost of financing. These pre-hearing deprivations are not merely hypothetical and cannot be disputed.

The Court's analysis of the procedural due process issues raised in this case must start with certain indisputable facts. First, Orders impose

significant immediate deprivations on Recipients, either through the costs compliance, or through the impacts on the Recipient's ability to transfer title, the market value of the property, or the ability to obtain financing and the cost of financing.[14] Second, Recipients do not have any

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[14] This Court recognized long ago that "property" defined in the "ordinary, everyday sense[]" is not only the tangible "thing which is the subject of ownership" but also "the owner's [intangible] right to control and dispose of that thing." *Crane v. Comm'r*, 331 U.S. 1, 6 (1947). *See Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 85 (1988) (lien that impairs "ability to mortgage or alienate" property imposes a cognizable deprivation). In *Doehr*, 501 U.S. 1 this Court rejected the argument that the attachment did not give rise to an actionable deprivation of property because the "effects do not amount to a complete, physical, or permanent deprivation of real property," explaining that an attachment deprives individuals of protected property interests because it "ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; [or] reduces the chance of obtaining a home equity loan or additional mortgage." 501 U.S. at 11. A does not amount to a deprivation of an important right is belied by *Doehr*. *Doehr* makes it clear that it is not only the seizure of property that deprives the defendant of possession and use of the property. In his concurring opinion, Justice Rehnquist emphasized the Court's unanimous recognition that the pre-judgment attachment statute in *Doehr* does not deprive the defendant of the use or possession of the property. *Doehr*, 501 U.S. at 26 (Rehnquist, J., concurring). Justice Rehnquist noted that "a lienor need not obtain possession or use of real property belonging to a debtor in order to significantly impair its

opportunity for a hearing before a neutral decision-maker to challenge Orders before these deprivations occur. Third, in this case and in most cases, the government has no urgent need to issue Orders that would justify dispensing with the due process requirement of a pre-deprivation hearing.

As the Supreme Court explained in *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) "some sort of hearing is required *before* an individual is finally deprived of a property interest." (Emphasis supplied). "[T]he root requirement of the Due Process Clause" is "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (citations omitted); *see also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55 (1993). "Although the Court has held that due process tolerates variances in the form of a hearing appropriate to the nature of the case. . . the Court has traditionally insisted that whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect." *Fuentes*, 407 U.S. 67, 82 (internal citations and quotations omitted). "Many controversies have

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value to him. *Id.* at 28.

raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and an opportunity for hearing appropriate to the nature of the case." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). The CWA scheme violates this basic principle, and the explicit or implied post-deprivation remedies expounded by Ninth Circuit do not address the lack of pre-deprivation due process.

The possibility that a Recipient might recover some of its losses in a post-deprivation hearing does not excuse EPA of its obligation to provide Recipients with a hearing before the deprivation occurs. The Supreme Court has held that "no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Fuentes*, 407 U.S. at 82 (citation omitted and alteration in original). "In situations where the State feasibly can provide a pre-deprivation hearing before taking property, it generally must do so regardless of the adequacy of a post-deprivation tort remedy to compensate for

the taking." *Zinermon v. Burch*, 494 U.S. 113. 132 (1990).

The government may avoid the requirement of a pre-deprivation hearing only in extraordinary situations — which are not present here — where immediate government action is "necessary to secure an important governmental or general public interest" and there is a "special need for very prompt action." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678 (1974). "[I]t is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate (a protected) interest . . . it must afford notice and opportunity for hearing appropriate to the nature of the case before the termination becomes effective." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570, n.7 (1972); *see also James Daniel Good*, 510 U.S. at 53 ("We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in extraordinary situations where some valid government interest is at stake that justifies postponing the hearing until after the event.").

Pre-enforcement process may be postponed until after the government deprives a person of his rights, but only in "extraordinary situations where

some valid government interest is at stake that justifies" the postponement. *Boddie v. Connecticut*, 401 U. S. 371, at 379 (1971); *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) ("[W]here a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause."). The required hearing "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

a. The "emergency situation" exception does not apply.

Although the Ninth Circuit alluded to Congress' intent to "allow EPA to act to address environmental problems quickly and without becoming immediately entangled in litigation," and "[t]his goal of enabling swift corrective action would be defeated by permitting immediate judicial review of compliance orders, (622 F.3d at 1144 (citation omitted); Pet.App. A-8), there is no evidence that any emergency existed in this case, nor does the Order itself even recite that there is a need for immediate action. *See* Pet.App. G-1, *et seq.*

Even if in some cases there is a need for "swift corrective action," EPA does not issue Orders solely or primarily to address environmental emergencies. The CWA does not condition the issuance of an Order on a finding of a need for "swift corrective action." Thus the invocation of EPA's need to sometimes take such "swift action" is a judicial invention.

To the contrary, as in this case, EPA routinely issues Orders even when no immediate corrective action has been found to be necessary. In this case, EPA's various iterations of compliance orders were silent about any emergency.

Because EPA does not issue Orders in emergencies, the absence of a pre-deprivation hearing is a fatal constitutional flaw in the scheme on its face.

III.

A BALANCING OF PRIVATE AND GOVERNMENT INTERESTS REQUIRES A PRE-DEPRIVATION HEARING BEFORE A NEUTRAL DECISION-MAKER

If this case were treated as an as-applied challenge to the statute, the lower courts should

have engaged in a "balancing" of governmental and private interests.

Under *Mathews v. Eldridge*, 424 U.S. 319 (1976) three factors determine the contours of the pre-deprivation hearing that is required to satisfy due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

The *Mathews* factors, properly weighed, demonstrate that EPA must provide Recipients with a pre-deprivation hearing before a neutral decision-maker and with at least some customary procedures, such as the right to present evidence and cross-examine EPA witnesses.

a. The Private Interest

Recipients would incur substantial expenses, either in remediating the "wetlands violation," then applying for a wetlands permit and, if such a permit were denied, appealing the denial. The alternative would be to disobey the Order, and potentially incur ruinous fines and penalties, and legal fees in defending against EPA's enforcement action.

In the situation of private citizen-homeowners, the Order and the processes that follow, could either put the landowner in deep debt or require them to abandon their property. Individual owners and owners of smaller companies face personal ruin, because EPA can sue them individually as defendants.

"[T]he possible length of wrongful deprivation" also "is an important factor in assessing the impact of official action on the private interests." *Mathews*, 424 U.S. at 341. In cases such as this, the harm to a Recipient's property interests is magnified by the long delay before a Recipient can obtain any post-deprivation review of an Order.

b. The Government Interest

The second factor is the financial and operational cost of additional process and the need to conserve "scarce fiscal and administrative resources." *Mathews*, 424 U.S. at 347-348).

The only government interest weighing against a pre-deprivation hearing is that such a hearing would cost EPA money. "A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. . . . [but] these rather ordinary costs cannot outweigh the constitutional right." *Fuentes*, 407 U.S. at 92 n.22; *INS v. Chadha*, 462 U.S. 919, 944 (1983). The governmental interest in not providing a pre-deprivation hearing based on marginal cost is minimal. This Court has properly recognized that where the government has no "special need for very prompt action" the mere cost or inconvenience to the government of providing review by a neutral is no basis for denying due process. *Fuentes*, 407 U.S. at 91

The court below held that Recipients have adequate opportunities to challenge an Order through a permit application process or an EPA enforcement action. Ironically, this holding shows

that providing Recipients with a pre-deprivation hearing is not too expensive or administratively inconvenient, because litigation in federal court is at least as expensive and time-consuming as a pre-deprivation hearing. A post-deprivation hearing before a neutral decision-maker and with procedural safeguards, similar to that provided under the Mine Act, as described in *Thunder Basin*, 510 U.S. at 206, would not impose any lesser costs or personnel burdens on the government than a pre-deprivation hearing because the scope of the substantive issues would be the same. The government cannot seriously plead additional financial or administrative burdens involving pre-deprivation hearings when it already claims to provide an immediate post-deprivation hearing. From an administrative standpoint it makes little difference whether that hearing is held before or after the seizure. *Connecticut v. Doehr*, 501 U.S. 1. 16 (1991). *See also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 59 (1993).

CONCLUSION

Without effective judicial review, the Sacketts' due process rights are violated.

For the foregoing reasons, the judgment of the court of appeals should be reversed.

September, 2011

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AMICUS CURIAE BRIEF

No. 10-1062

In the
Supreme Court of the United States

CHANTELL SACKETT, et vir,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL, IDAHO CONSERVATION LEAGUE, LAKE PEND OREILLE WATERKEEPER, KOOTENAI ENVIRONMENTAL ALLIANCE, IDAHO RIVERS UNITED, AND WATERKEEPER ALLIANCE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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NOVEMBER 30, 2011

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 15

ARGUMENT 19

I. EVEN IF THE CWA DOES NOT PRECLUDE JUDICIAL REVIEW OF EPA's ORDER, REVIEW IS UNAVAILABLE UNDER THE APA 19

A. The Order does not Satisfy this Court's Requirements for "Final" Agency Action 19

1. The Order did not mark the consummation of the agency's decisionmaking process 20

a. The ACO is not "final" because it invited petitioners to engage in informal discussions with EPA, before the agency decides whether the ACO's allegations warrant a civil enforcement action 20

b. Petitioners' argument that the ACO represents a "jurisdictional determination" that is immediately appealable is incorrect 22

2. The Order was not final because it was not one by which rights or

obligations were determined or from which legal consequences flowed 25

3. A rule holding ACOs to be final agency actions would undermine EPA's enforcement discretion and create perverse incentives that disserve the interest of all parties 27

4. Petitioners should not be rewarded for *failing* to take appropriate steps at the agency 28

II. THIS COURT SHOULD REJECT THE DUE PROCESS CLAIMS OF PETITIONERS AND THEIR *AMICI* 30

A. The ACO did not Deprive the Sacketts of a Cognizable Property Interest 30

B. Even if the ACO Affected a Property Interest, Petitioners Have Been Provided Adequate Opportunities for Process 33

III. IMMEDIATE JUDICIAL REVIEW OF ACOs IS NOT NECESSARY TO ENSURE ADEQUATE JUDICIAL SCRUTINY OF CWA JURISDICTIONAL ISSUES 35

CONCLUSION 36

TABLE OF AUTHORITIES

Cases: **Page**

Acquest Wehrle LLC v. U.S., 567 F.Supp.2d 402 (W.D.N.Y. 2008) 24

Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461 (2004) 26

Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 31

Bennett v. Spear, 520 U.S. 154 (1997) ..... *passim*

Buttrey v. U.S., 690 F.2d 1170 (5th Cir. 1982) ... 33, 34

Comm'rs of Pub. Works of Charleston v. United States, 30 F.3d 129 (4th Cir. 1994) 24

Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199 (2d Cir. 2009) 35

Costle v. Pac. Legal Found., 445 U.S. 198 (1980) 35

Deerfield Plantation Phase II-B Prop. Owners Ass'n, Inc. v. U.S. Army Corps of Eng'rs, 4:09-CV-01023-RBH, 2011 WL 2746232 (D.S.C. July 12, 2011) 29

Ex parte Young, 209 U.S. 123 (1908) 32

Fairbanks Northstar Borough v. U.S. Army Corps of Eng'rs, 543 F.3d 586 (9th Cir. 2008) 24-25, 30

GE v. Jackson, 610 F.3d 110 (D.C. Cir. 2010), cert denied. 131 S. Ct. 2559 (2009) 17, 31-32

Greater Gulfport Properties, LLC v. U.S. Army Corps of Eng'rs, 194 F. App'x 250 (5th Cir. 2006) 24

Heckler v. Cheney, 470 U.S. 821 (1985) 27

Hoffman Group, Inc. v. EPA, 902 F.2d 567 (7th Cir. 1990) 13, 25

Mathews v. Eldridge, 424 U.S. 319 (1976) 33-34, 35

N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007) 36

Nat'l Wildlife Fed'n v. Hanson, 859 F.2d 313 (4th Cir. 1988) 29

Precon Dev. Corp. v. U.S. Army Corps of Eng'rs, 633 F.3d 278 (4th Cir. 2011) 35

Rapanos v. U.S., 547 U.S. 715 (2006) 4, 35

Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) 35

St. Andrews Park, Inc. v. United States Dep't of the Army Corps of Eng'rs, 314 F.Supp.2d 1238 (S.D. Fla. 2004) 24-25

U.S. v. Donovan, 466 F.Supp.2d 595 (D. Del. 2006) 13, 33, 35

United States v. Bailey, 571 F.3d 791 (8th Cir. 2009) 36

United States v. Cundiff, 555 F.3d 200 (6th Cir. 2009) 35

United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006) 35

United States v. Johnson, 467 F.3d 56 (1st Cir. 2006) 35

United States v. Lucas, 516 F.3d 316 (5th Cir. 2008) 35

United States v. Robison, 505 F.3d 1208 (11th Cir. 2007) 36

Statutes, regulations and rules:

5 U.S.C. § 552 6

5 U.S.C. § 704 19

28 U.S.C. § 2462 27

Clean Water Act, Pub. L. No. 92-500, §2, 86 Stat. 816 (33 U.S.C. 1251 *et seq.*) ..... *passim*

33 U.S.C. § 1311 21

33 U.S.C. § 1318 13

33 U.S.C. § 1319 25

33 U.S.C. § 1319(a) 13

33 U.S.C. § 1319(d) 13, 16, 25-26, 32

33 U.S.C. § 1344 4

33 U.S.C. § 1344(a) 17, 29

33 U.S.C. § 1362(12) 21

42 U.S.C. § 9696 31

33 C.F.R. § 326.3 11

33 C.F.R. § 326.3(e) 17, 29

33 C.F.R. § 328.3(a) 4

33 C.F.R. § 328.3(c) 4, 9

33 C.F.R. Pt. 331 ..... 4, 16-17, 28, 29

33 C.F.R. § 331.10 15

33 C.F.R. § 331.12 ..... 4, 15

33 C.F.R. § 331.2 4

33 C.F.R. § 331.6(c) 29

65 Fed. Reg. 16,486 4

72 Fed. Reg. 11,092 14

OTHER:

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Idaho Department of Parks and Recreation, Priest Lake State Park, http://parksandrecreation.idaho.gov/parks/priestlake.aspx 3

Revised Designation of Critical Habitat for Bull Trout in the Coterminous United States, 75 Fed. Reg. 63942 (Oct. 18. 2010). 3

MEMORANDUM BETWEEN THE DEPARTMENT OF THE ARMY AND THE ENVIRONMENTAL PROTECTION AGENCY CONCERNING THE DETERMINATION OF THE SECTION 404 PROGRAM AND THE APPLICATION OF THE EXEMPTIONS UNDER SECTION 404(F) OF THE CLEAN WATER ACT (Jan. 19, 1989, as amended Jan. 4, 1993) *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/mou/404f2.pdf 4-5

Priest Lake Chamber of Commerce, Priest Lake Idaho, http://www.priestlake.org 2

Priest Lake State Lessees' Association, http://priestlakestatelessees.org 3

Regulatory Guidance Letter 05-02, EXPIRATION OF GEOGRAPHIC JURISDICTIONAL DETERMINATIONS, U.S. ARMY CORPS OF ENGINEERS (JUNE 14, 2005), *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/cwa_guide/app_f_rgl05-02.pdf 5

Sackett Family Comments on EPA During Property Rights Forum (Oct. 13, 2011), *available at* http://www.youtube.com/watch?v=hqp-Q9mggQ8 2

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to this Court's Rule 37.3(b), Natural Resources Defense Council, Idaho Conservation League, Lake Pend Oreille Waterkeeper, Kootenai Environmental Alliance, Idaho Rivers United, and Waterkeeper Alliance respectfully request leave of the Court to file this brief amici curiae in support of Respondents. The questions presented in this case have a critical and direct impact on the enforcement of the Clean Water Act. As organizations involved in environmental advocacy, *Amici* have a unique perspective and interest in the outcome of this case.

Written consent to the filing of this brief has been granted by counsel for the Respondents. Counsel to the Petitioners declined consent, necessitating the filing of this motion.

DATED: December, 2011

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Natural Resources Defense Council (NRDC) is a national, non-profit environmental advocacy organization incorporated under the laws of the State of New York. NRDC has over one million members and online activists nationwide. In its effort to protect natural resources and public health, NRDC has litigated numerous cases under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387. NRDC and its members have a significant interest in maintaining CWA protection for our nation's waters.

Idaho Conservation League, Lake Pend Oreille Waterkeeper, Kootenai Environmental Alliance, and Idaho Rivers United are environmental organizations committed to preserving and restoring the pristine nature of Idaho's lakes, rivers and wetlands. Collectively, they represent thousands of Idaho residents and their desire for clean water, healthy forests and biologically sound wetlands protected by state and federal environmental laws such as the CWA.

Waterkeeper Alliance ("WKA") is an international, nonprofit corporation organized under the laws of the State of New York. WKA is an

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission.

umbrella organization comprised of nearly 200 member Waterkeeper programs globally. WKA works to restore and protect the waters of the United States through education, scientific research, litigation, and other advocacy. WKA supports EPA's efforts to develop and execute a robust enforcement regime to comply with its mandate under the CWA.

STATEMENT OF THE CASE

Petitioners own a .63 acre lot at 1604 Kalispell Bay Road in Bonner County, Idaho, approximately 500 feet from the shore of Priest Lake.[2] Petitioners claim they had "absolutely no fair reason to believe that their property was regulable under the CWA," Cert. Pet. at 5, when they received an EPA compliance order indicating that the property is a protected wetland that may not be filled without a CWA permit. But facts not disclosed to this Court by petitioners indicate that they were repeatedly informed by a wetlands scientist in *their* employ, by EPA, and by the U.S. Army Corps of Engineers ("Corps") that their property may be a protected wetland *long* before they received the administrative compliance order ("ACO" or "Order") challenged here. Petitioners nonetheless chose not to seek a permit.

The Priest Lake Region: Priest Lake has been described as Idaho's "crown jewel."[3] The lake

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[2] *Sackett Family Comments on EPA During Property Rights Forum* (Oct. 13, 2011), *available at* http://www.youtube.com/watch?v=hqp-Q9mggQ8 ("*Property Rights Forum*").

[3] *See* Priest Lake Chamber of Commerce, Priest Lake Idaho, http://www.priestlake.org (last visited Nov. 23, 2011).

measures nineteen miles long and comprises over 26,000 acres of unusually clear waters, fed by streams cascading from the peaks of the Selkirk Mountains.[4] Priest Lake also is home to several native fish species, and is considered critical habitat for bull trout, a threatened species.[5] The surrounding area is home to dense forests of cedar, fir, and tamarack trees as well as important populations of whitetail deer, bears, moose, and bald eagles.[6]

Protecting the animal habitats, the scenic beauty of Priest Lake, and the accompanying economic activity requires responsible stewardship by both the federal and state governments.[7] To the east and south of the lake lies Priest Lake State Park; to the west, just past the state border, lies Colville National Forest. Nearly seventy percent of Bonner County is woodland, most of which lies in Kaniksu National Forest or Priest Lake State Forest, while only a small portion of the region's woodland is privately owned.

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[4] *See* Idaho Department of Parks and Recreation, Priest Lake State Park, http://parksandrecreation.idaho.gov/parks/priestlake.aspx (last visited Nov. 23, 2011) ("Priest Lake State Park").

[5] Revised Designation of Critical Habitat for Bull Trout in the Coterminous United States, 75 Fed. Reg. 63942 (Oct. 18, 2010).

[6] *See* Priest Lake State Park.

[7] *See* Priest Lake State Lessees' Association, http://priestlakestatelessees.org/ (last visited Nov. 23, 2011).

The Statutory and Regulatory Backdrop: The CWA protects "waters of the United States," which applicable regulations define to include "intrastate lakes . . . the use, degradation or destruction of which could affect interstate or foreign commerce," as well as wetlands "adjacent" to such lakes. 33 C.F.R. § 328.3(a); *see also Rapanos v. U.S.*, 547 U.S. 715 (2006). The regulations define "adjacent" to mean "bordering, contiguous, or neighboring," and explain that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. § 328.3(c).

The Corps processes permit applications under Section 404 of the CWA for the discharge of dredged or fill material into "waters of the United States." 33 U.S.C. § 1344. Decisions to deny a permit, or to issue one with conditions, are subject to judicial review following exhaustion of administrative appeals. 33 C.F.R. § 331.12. A property owner uncertain of whether his or her property includes waters covered by the Act may obtain a "jurisdictional determination" (or "JD"), which is either a "preliminary" or "approved" written statement from the Corps addressing whether a permit would be required to discharge fill material on a particular parcel. 33 C.F.R. § 331.2. Under the Corps' regulations, both "preliminary" and "approved" JDs must be in writing. *See* 33 C.F.R. § 331.2. JDs are subject to administrative appeal, *see* 33 C.F.R. Pt. 331, as per a Congressional directive, *see* 65 Fed. Reg. 16,486, 16,487, and typically are binding upon the Government in any legal disputes arising within the next five years. *See* MEMORANDUM BETWEEN THE DEPARTMENT OF THE ARMY AND THE ENVIRONMENTAL

PROTECTION AGENCY CONCERNING THE DETERMINATION OF THE SECTION 404 PROGRAM AND THE APPLICATION OF THE EXEMPTIONS UNDER SECTION 404(F) OF THE CLEAN WATER ACT (Jan. 19, 1989, as amended Jan. 4, 1993) (JDs binding on the government in future legal action), *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/mou/404f2.pdf; Regulatory Guidance Letter 05-02, EXPIRATION OF GEOGRAPHIC JURISDICTIONAL DETERMINATIONS, U.S. ARMY CORPS OF ENGINEERS (JUNE 14, 2005) (five year rule), *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/cwa_guide/app_f_rgl05-02.pdf.

The Events Leading up to Petitioners' Lawsuit: Petitioners own Sackett Contracting and Excavating, which operates in the Priest Lake area and employs as many as forty people. *See Property Rights Forum* (full citation in footnote 2, above). Petitioners purchased their lot in 2005. They filed this lawsuit on April 28, 2008.

Petitioners' brief provides little explanation for what happened leading up to the present suit, stating only:

> [The Sacketts] obtained all required local permits and began to build their new home when they were issued an EPA compliance order. [Citation omitted.] The Sacketts were devastated when they received the compliance order. . . Believing that their property was not a "wetland" within EPA's jurisdiction, the Sacketts attempted to resolve the compliance order informally, but EPA refused to address the

> Sacketts' jurisdictional arguments. . . . Therefore, in April, 2008, the Sacketts filed suit to contest the jurisdictional bases for the order.

Cert. Pet. Br. at 6-9. This description omits integral parts of petitioners' own prior account of their experience.

Documents obtained from the Corps via a request under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), include a "[t]ime line of what has taken place" at the "[p]roperty at 1604 Kalispell Bay Road" provided by petitioner Chantell Sackett to the Corps on May 23, 2007. Lodged Materials 16-21.[8] That document indicates that petitioners "[s]tarted clearing property at 1604 Kalispell Bay Rd. for shop and home" on April 30, 2007. *Id.* at 16. Only three days later, on May 3, 2007, "3 people from EPA" (including an individual named Carla Fromm) "showed up" and "asked the equipment operator to stop" work "pushing pit run that was brought in to build up the site where the house and shop are to be built."[9] *Id.* EPA officials asked the operator "for a permit to fill in wetlands but he said he had nothing at the site." *Id.* When the operator was unable to

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[8] On the same day this brief was filed, *Amici* sought permission to lodge with the Court, under Supreme Court Rule 32, all documents provided by the Corps in response to the request and the Corps' cover letter conveying them. The name of the requesting party has been redacted to protect the requestor's privacy.

[9] "Pit run" is a contractor's term for material consisting of a mixture of gravel, sand, rock, rock fragments, and other material as found in natural deposits such as a gravel pit.

produce a permit, EPA officials went to the office of petitioners' construction firm and "asked for any information on the project." *Id.* The Sackett employee apparently did not provide any information, but questioned EPA's "authority . . . to shut down a job site, when they don't have any supporting evidence that proves the property is wetland." *Id.* In response, according to Ms. Sackett's timeline, the EPA officials noted that they had observed "water there" on the job site. *Id.*

The next day, May 4, Ms. Sackett received a call from "John Olsen from the EPA," who "said that he had been to the Corps of Engineers and that they have no information on the project." *Id.* Mr. Olson indicated that he would work on "finding out if [petitioners' property] is wetlands." *Id.* That same day, Ms. Sackett called a "professional wetland scientist," *id.* at 28, named Tom Duebendorfer "to see if he could determine whether [the subject property] is wetlands." *Id.* at 16. Mr. Duebendorfer asked Ms. Sackett to "send him some information on the site and he would get back to [her] the following week." *Id.* Ms. Sackett also reached out on May 4 to Ms. Fromm at EPA and informed her that Mr. Duebendorfer had been asked "to determine if this site is wetlands." *Id.* Ms. Sackett offered to have Mr. Duebendorfer contact Ms. Fromm with the results of his analysis, and "Carla was good with that." *Id.*

On May 21, 2007, Ms. Sackett and Mr. Duebendorfer "met at [petitioners'] property," and the latter announced that he "did determine that the site is part of a wetland." *Id.* at 17. According to Mr. Duebendorfer, the site "is not an isolated wetland" because "it joins a wetland to the South and to the

West across a road." *Id.* Mr. Duebendorfer offered his further opinion that petitioners "should continue not to do any work to the site until [they had] the US Army Corps evaluate the site on the best way to proceed." *Id.*[10]

On May 22, Ms. Sackett "went to go see Beth Reinhart at the US Army Corps" in Coeur d'Alene, Idaho. *Id.* Ms. Reinhart was "out of the office," but Ms. Sackett was able to meet with Dean Hilliard of the Corps "on the site at 1604 Kalispell Road." *Id.* Mr. Hilliard collected some information from Ms. Sackett, and "said that [petitioners] should not do anything until Beth has had a chance to look at the information." *Id.* During their meeting, however, Mr. Hilliard "gave [Ms. Sackett] an application to fill out for a permit" to fill wetlands. *Id.* On May 23, Ms. Sackett spoke with Mr. Hillard again, and he asked her to "send him the facts on what had taken place" and "Ms. Sackett agreed." *Id.*[11]

Also on May 23, Ms. Sackett spoke again with Mr. Duebendorfer "to see if he knew who had jurisdiction" over the site between EPA and the Corps. *Id.* Mr. Duebendorfer indicated that "EPA deals with water quality issues and . . . that wetlands are regulated by the Core [sic]." *Id.* Ms. Sackett then "asked [Mr. Duebendorfer] if he would

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[10] The FOIA documents also include a June 2007 letter from Mr. Duebendorfer to Ms. Sackett that refers to 1604 Kalispell Bay Road as "your 'wetland' property" and describes soils removed from that lot as "wetland soils." Lodged Materials 28.

[11] This agreement presumably resulted in the timeline prepared by Ms. Sackett from which these facts are taken.

get in touch with Carla Fromm from the EPA and let her know that he did determine the site to be part of a wetlands and [Mr. Duebendorfer] said he would." *Id.*

Later that same day, Ms. Sackett spoke again with Mr. Hillard at the Corps by phone. Ms. Sackett's notes indicate that during that call she described the siting of the subject parcel to Mr. Hilliard thus:

> There is no drainage to the West of my property as the elevation is higher. The property to the East of my property is the same as mine, wetlands, but there is no drainage for that. There are no culverts under Kalispell Bay Road from the South side [where lot 1604 is located] to the North side where there are wetlands. The Rudie Trust wetlands on the North side do drain West towards Kalispell Creek.[12]

Id. at 17, 21. According to her notes, however, Ms. Sackett argued to Mr. Hilliard that "[i]f there is no drainage off my property into any water system, then it seems to me that my property would be considered *isolated* wetlands," *Id.* 21 (emphasis added), perhaps reflecting her view that "isolated" wetlands are not wetlands regulable under the CWA. *See* 33 C.F.R. § 328.3(c).

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[12] The FOIA documents include hand-drawn maps, faxed from the machine of "Mike Sackett, Inc.," to the Corps, confirming the position expressed in Ms. Sacketts' notes that there are wetlands on three sides of the subject property. Lodged Materials 19, 20.

In sum, there are a number of facts in Ms. Sackett's notes from the time during which petitioners began construction that would appear relevant here, including:

- EPA officials observed "water there" on petitioners' land when they visited on May 3, 2007, and Ms. Sacketts' own notes reflect her view that the parcel includes wetlands and is surrounded by wetlands (at least some of which she believed are regulable under the CWA) on three sides.
- EPA officials told the petitioners only *three days* after petitioners "[s]tarted clearing [the] property" that they might be filling wetlands in violation of the CWA.
- The professional wetland scientist apparently *engaged by petitioners* opined on May 21, 2007—only three weeks after they began clearing their land—that their land was a wetland, and *not* an "isolated" wetland, and that petitioners should not do any more work on the site until obtaining the Corps' advice on how to proceed.
- The Corps *provided a permit application to petitioners* on May 23, 2007 and invited them to complete it.
- On that same day, Ms. Sackett instructed the wetland scientist she had hired to *inform EPA that he had determined petitioners' property to be a regulable wetland.*
- Ms. Sackett's notes—prepared long before the ACO issued—expressly recognize that petitioners' parcel *is* a wetland; she apparently thought that

it was not a *regulable* wetland because it purportedly did not drain into Kalispell Creek or Priest Lake.

There appears to be some tension between these facts and petitioners' claims before this Court that they had "absolutely no fair reason to believe that their property was regulable under the CWA." Pet. App. 5.

The Administrative Compliance Order: Even after being 1) informed by their expert that their property was potentially subject to the CWA and 2) invited by the Corps to file a permit seeking permission to fill, petitioners made no effort to apply for an "after-the-fact" permit as allowed under Corps regulations. *See* 33 C.F.R. § 326.3. Nor did they perform any remediation on their site. Against this backdrop—and a full six months after petitioners were first informed that they may have been illegally filling a wetland in contravention of the CWA—EPA issued the petitioners an ACO on November 26, 2007. *See* Pet. App. G. The Order reiterated EPA's view that petitioners' property contains regulable wetlands and that discharging fill into those wetlands without a permit violates the CWA. *Id.* at G-1 to G-4. Based on that view, EPA provided a plan for petitioners to restore the wetland to its pre-fill state. The plan provided conditions that should be met to comply with the CWA, a time frame for achieving that compliance, and noted that penalties and fines that could be assessed against petitioners by a federal court. *Id.* at G-4 to G-6. By petitioners' estimate, their cost of compliance with the ACO would be $27,000. Pet. Br. at 18.

Importantly, the ACO expressly provided petitioners a chance to redress any allegations in the Order that they believed to be inaccurate. "EPA encourages Respondents to engage in informal discussion of the terms and requirements of this Order upon receipt. Such discussions should address any allegations herein which Respondents believe to be inaccurate or requirements which may not be attainable and the reasons why." Pet. App. G-5, G-6. The ACO was amended three times to extend the time for compliance in light of additional facts about the condition of the property that came to EPA's attention following issuance of the original order. Cert. Opp. 4-5.

Petitioners waited over four months from the issuance of the ACO before they reached out to EPA. Even then, rather than contacting EPA—as the ACO invited petitioners to do—to continue the kind of informal discussions with the government in which petitioners had engaged prior to issuance of the Order, petitioners sought a formal hearing.[13] Due to the resource-intensive nature of formal adjudication, however, agencies are reluctant to undertake such hearings, particularly when an informal channel of communication has been provided. *See* below at 23. EPA did not grant a formal hearing to petitioners. Finally, on the eve of the date set for compliance, petitioners filed an action in federal court seeking "a declaration that Plaintiffs' property is not subject to the CWA, and that enforcement of the ACO without providing Plaintiffs a hearing violates Plaintiffs' procedural due process rights." Complaint ¶ 3.

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[13] *See* Complaint Att. B.

Petitioners' lawsuit is premised on the assumption that an ACO issued by EPA under sections 308 and 309(a) of the CWA, 33 U.S.C. §§ 1318 and 1319(a), concludes EPA's deliberations and has independent legal significance. But an ACO issued by EPA is *not* self-executing, and penalties cannot be assessed until a district court determines that a violation of the CWA occurred. *See* 33 U.S.C. § 1319(d); *Hoffman Group, Inc. v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990). Moreover, the judge is under no obligation to impose the maximum fines authorized by statute, but instead is required to "consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." 33 U.S.C. § 1319(d). As a consequence, the penalties imposed may be relatively small compared to the potential penalties available. *See, e.g., U.S. v. Donovan*, 466 F.Supp.2d 595, 600 (D. Del. 2006) ("Reviewing the totality of the circumstances in this case . . . the Court concludes that a $256,000 penalty is appropriate . . . [although] the maximum penalty for Defendant's repeated violations would fall in the range of $11 million to $15 million dollars in fines.").

It also bears emphasis that landowners seeking to fill wetlands covered by the CWA can avoid ACOs by obtaining a Section 404 permit and adhering to the conditions set forth in the permit.

Petitioners argue that the process of obtaining a Section 404 permit is "ruinously expensive." Pet. Br. at 30 (citing one estimate of the cost of an *individual*

Clean Water Act permit). But single family construction projects, like the one petitioners claim they wished to build, often do not require an individual permit from the Corps; rather under Nationwide Permit 29, such construction can often proceed subject to very limited review if the construction will fill less than half an acre of waters and other conditions are met. *See* 72 Fed. Reg. 11,092, 11,186 (Mar. 12, 2007).[14] Such nationwide permits are designed to streamline the process of obtaining a permit for an activity that will have "minimal individual and cumulative impacts."[15] And while preparation of a required "pre-construction notification" may take some time and resources, it is not "ruinously expensive," Pet. Br. at 30—the median cost of obtaining a permit of this sort has been estimated to be $11,800 and a simple project (like the petitioners') could be as little as $2,000.[16]

In short, there is more to this case than is suggested by the briefs of petitioners and their *amici*. Ms. Sackett herself expressed the view that petitioners' property includes wetlands and borders wetlands in three directions, and that at least some of those neighboring wetlands are subject to the CWA; the wetland scientist she consulted advised

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[14] Ms. Sacketts' notes indicate that "just under ½ acre" was filled on petitioners' parcel. Lodged Materials 17.

[15] David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 61-63 (2002).

[16] *Id.* at 74 n. 67. Surely this is far less than the typical cost of litigating a case in federal court.

that petitioners' should consult with the Corps. And while it may have taken some time and effort to pursue a Section 404 permit, developers and construction firms routinely obtain such permits. Finally—and of great importance here—if such a permit application is denied, the applicant is entitled to pursue an administrative appeal and, subsequently, seek judicial review of a final agency action. 33 C.F.R. §§ 331.10, 331.12. Petitioners chose to ignore the options available to them and seek to challenge a non-final agency action.

SUMMARY OF ARGUMENT

I. The Order that petitioners seek to challenge is not "final" for purposes of judicial review because it fails both prongs of the test for finality set forth in *Bennett v. Spear*, 520 U.S. 154 (1997). The ACO did not "mark the consummation of the agency's decisionmaking process," *id.* at 177-78, because the Order expressly invited petitioners to contact the agency to engage in further "informal discussion" to "address" any of the Order's "allegations" that petitioners "believe[d] to be inaccurate." Pet. App. at G-5, G-6. Although petitioners had engaged in many informal contacts with the government *before* the ACO issued, they declined the Order's invitation to pursue further discussions.

The Order also fails *Bennett*'s second prong, because it is not an order by which legal rights or obligations are determined or from which legal consequences flow. 520 U.S. at 177-78. ACOs under the CWA are not self-executing; rather, in order "to enforce a compliance order, the EPA must bring an action alleging a violation of the CWA itself." Pet. App. A-12. Moreover, even if EPA were to bring an

enforcement action against the Sacketts and prove a violation of the CWA, it is the *district court* that must set the amount of any penalty under the CWA, *not* EPA. *See* 33 U.S.C. § 1319(d). In short, then, it is violating the *CWA*—not anything about the ACO—that subjects the Sacketts to fines and penalties; if they discharged fill into a water of the United States without a permit, they were in violation of the CWA before the ACO issued, and they still are.

A rule treating ACOs as final actions would undermine EPA's enforcement discretion, allowing the recipients of ACOs to hale EPA into court before the agency has otherwise determined whether to pursue civil enforcement action. This would create a disincentive for EPA to issue ACOs and thereby eliminate the important notice function served by such orders, which provide an opportunity for parties to limit their liability in advance of (or avoid entirely) a potential civil enforcement action.

Petitioners also should not be rewarded for failing to utilize the multiple administrative processes that they could (and should) have followed to achieve a resolution of their concerns, both prior to commencing construction on their property and between commencement of construction and issuance of the ACO. First, the Corps has established a process for obtaining formal determinations of whether a permit would be required to discharge fill material on a particular parcel, *see* 33 C.F.R. Pt. 331, but petitioners began construction without seeking such a ruling. Second, parties may obtain judicial review of whether their proposed activities are subject to the CWA by applying for a permit from the Corps and, in the event of an adverse permit decision

(including a permit issued with conditions objectionable to the applicant), exhausting administrative appeals to obtain a final agency action. 33 U.S.C. § 1344(a), 33 C.F.R. Pt. 331. Petitioners could have done so, moreover, even after commencing construction, by applying for an "after-the-fact" permit. 33 C.F.R. § 326.3(e).

This Court should also reject petitioners' due process arguments. First, the ACO did not deprive petitioners of a cognizable property interest because it does not compel them to do anything not already compelled by the CWA. Moreover, EPA's opinion expressed in the ACO—that petitioners' property does constitute a "water of the United States"—is neither the agency's last word on the subject nor the legal system's last word on the subject. Indeed, to give the Order any legal force, EPA must still prove up the basis for the Order's findings in court, based on a preponderance of the evidence, at which time petitioners are entitled to the most robust "process" provided by the American system of administrative law—an adversarial, adjudicatory hearing before an Article III judge.

II. Petitioners' *amicus* General Electric ("GE") revisits its losing positions in *GE v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010), *cert. denied GE v. Jackson*, 131 S. Ct. 2559 (2011), and those arguments should also be rejected by this Court. First, GE suggests that the ACO's "market" effects—such as allegedly raising petitioners' "borrowing costs," GE Br. 12—represent a deprivation of property. As the D.C. Circuit held, however, "independent market reactions" to administrative action with such limited, consequential effects on property holders do not

merit protection under the due process clause. *GE*, 610 F.3d at 308-10. The D.C. Circuit also rejected GE's argument that the possibility of "enormous" fines under an administrative order violates due process, holding that is not so where—as here—fines proposed by the agency are "subject to a 'good faith' or 'reasonable ground[s]' defense" and "the imposition of penalties is subject to judicial discretion." *Id.* at 307 (internal citations omitted).

Petitioners and their *amici* also repeatedly suggest that the ACO here violates due process because "EPA has no administrative process the exhaustion of which will produce an action reviewable in court." *See e.g.*, Pet. Br. at 14. But the CWA's permitting process provides parties the opportunity for review without exposing themselves to potential penalties, and that process *does* lead to judicially reviewable final agency action. Petitioners' objections to that process boil down to (1) they allegedly did not know about it; and (2) the process is supposedly too expensive to count for due process purposes. But just as these objections are insufficient to overcome the need for final agency action to qualify for judicial review—and, moreover, are contradicted by the facts—they also cannot justify the petitioners' failure to pursue the process to which they were entitled.

III. While *Amici* Competitive Enterprise Institute and American Petroleum Institute, *et al.*, suggest that the Court should authorize petitioners to seek judicial review of the ACO because it is otherwise difficult to subject questions about the scope of the CWA to judicial scrutiny, that is simply not true. There is no shortage of federal court decisions on

whether particular aquatic features constitute "waters of the United States" subject to the CWA, including recent decisions by this Court and nearly every federal court of appeals.

ARGUMENT

I. EVEN IF THE CWA DOES NOT PRECLUDE JUDICIAL REVIEW OF EPA's ORDER, REVIEW IS UNAVAILABLE UNDER THE APA.

Amici agree with the Ninth Circuit that Congress intended the CWA to *prohibit* pre-enforcement review of ACOs regardless of whether they would otherwise have been reviewable under the APA. Pet. App. A-6 to A-9. But even if this Court reverses the Ninth Circuit's holding that the CWA precludes review, it should remand for the lower courts to address APA issues in the first instance. If this Court does reach the APA issues, however, it should hold that petitioners cannot obtain judicial review under the APA because there has been no "final" agency action, which is a prerequisite to judicial review of agency action under 5 U.S.C. § 704.

A. The Order does not Satisfy this Court's Requirements for "Final" Agency Action.

This Court has set forth clear guidelines for determining when agency action is "final" for purposes of review under the APA. Specifically, in *Bennett*, 520 U.S. at 177-78 (internal quotations omitted), the Court held that to be "final," an agency action must (1) "mark the consummation of the agency's decisionmaking process," and (2) "be one by which rights or obligations have been determined, or

from which legal consequences will flow." The ACO here fails both prongs of this analysis.

1. The Order did not mark the consummation of the agency's decisionmaking process.

Petitioners acknowledge the hurdles imposed by *Bennett*, but argue that the ACO meets those requirements. Pet. Br. at 54-56. With respect to the first prong—consummation of the agency process—petitioners make two separate arguments, although their brief makes no distinction between them. First, petitioners claim that "[t]he order does not initiate any administrative process, nor is there any administrative process whereby the Sacketts can seek review of the order." *Id.* at 55. This argument is flatly wrong—indeed, it ignores the terms of the Order itself. Petitioners' second, more elliptical, claim is that the ACO represented a jurisdictional determination by EPA, and that such determinations are immediately appealable. *See id.* As set forth below, that argument is also completely untenable.

a. The ACO is not "final" because it invited petitioners to engage in informal discussions with EPA, before the agency decides whether the ACO's allegations warrant a civil enforcement action.

The applicable (amended) version of the ACO states that petitioners' land "contains wetland within the meaning" of EPA's regulations; that petitioners "discharged fill materials into wetlands" on their land; and that such discharge was in violation of sections 301 and 502(12) of the Act, 33 U.S.C. §§

1311 and 1362(12). Pet. App. G-2, G-3. The Order accordingly indicates that petitioners must "remove all the unauthorized fill material placed within" their parcel and restore the site "to its original, pre-disturbance topographic condition." *Id.* at G-4. But the Order does not stop there—rather, it specifically "encourages [the Sacketts] to engage in informal discussion of the terms and requirements of the Order," including "any allegations herein which Respondents believe to be inaccurate or requirements which may not be attainable and the reasons why." *Id.* at G-5, G-6.

As set forth above, petitioners engaged in a lengthy period of informal contacts with EPA (and the Corps) *before* the ACO issued. Ms. Sackett had repeated contacts, both in person and by phone, with Carla Fromm and John Olson at EPA, and even instructed the wetlands scientist whom petitioners apparently engaged to let Ms. Fromm know that he had found petitioners' land to be a wetland subject to regulation under the CWA. Petitioners were thus fully aware of how "to engage in informal discussion" with EPA, Pet. App. G-5, and entirely capable of doing so.

In light of the Order's express invitation to petitioners to engage in further "informal discussion" with the agency *and* their repeated earlier contacts with the agency, their claim that there is "no administrative process whereby [they] can seek review of the Order," Pet. Br. at 55, is puzzling. There is a clear "administrative process" for seeking further review—the "informal discussion" process identified by the Order itself. Petitioners' argument

simply ignores the ACO's invitation to informal discussion.

Petitioners also appear to argue, however, that EPA's failure to grant them a *formal* hearing demonstrates that there was no "administrative process whereby [they] can seek review of the order," *id.*, and thereby established the ACO's finality for purposes of judicial review. That is simply not so. It is true that EPA did not grant petitioners' request for a formal hearing, but that does not demonstrate the finality of the Order. As both this Court and the lower courts have pointed out, administrative agencies frequently deny *formal* hearings because they simply do not have the resources to engage in that particular kind of review with respect to all the decisions that they are required to make under the law. *See infra* at 35. In this case, however, the agency offered petitioners *informal* review instead, which provides the opportunity to persuade agency decisionmakers that some or all of the order's allegations were incorrect *before* EPA consummates its decisionmaking process by determining whether to file an enforcement action in court. *See* SG Br. at 26-27. In these circumstances, the agency's unwillingness or inability to grant a formal hearing does not render the ACO final.

b. Petitioners' argument that the ACO represents a "jurisdictional determination" that is immediately appealable is incorrect.

Petitioners' second argument with respect to "consummation" of the agency process appears to be that because someone at EPA "had to determine that [the agency] had regulatory authority over the

Sacketts' property" as a "logical prerequisite" to issuing an ACO, the ACO represents a jurisdictional determination by EPA that is immediately appealable. Pet. Br. at 54-55. Petitioners claim that "'[t]here are no further steps for the agency to take *with respect to jurisdiction*" and—although they do not explain why—they appear to believe that the ACO's finding of EPA jurisdiction over their property is, accordingly, immediately appealable.

If this is, in fact, petitioners argument, it badly misconceives the nature of the APA's "finality" requirement. It is, of course, true that *any* time an executive agency issues an order purporting to regulate anything, *someone* at the agency has made an implicit determination that the agency has regulatory authority over the property or conduct in question. But that fact has essentially nothing to do with the test for "finality" under *Bennett*. The fact that *someone* at EPA—in this case, Richard B. Parkin, Acting Director of the Office of Ecosystems, Tribal and Public Affairs, in EPA's Seattle, Washington office—believed that petitioners' land was subject to the CWA does not mean that the agency has "consummated" its decisionmaking process on that issue. And, of course, we know from the ACO itself that the agency has not done so, as it invited petitioners to engage in informal discussions with EPA if they disagreed with any aspect of the ACO.

Writing in support of petitioners, *amici* the States of Alaska, et al., make an argument similar to petitioners' claim that the ACO constitutes a jurisdictional determination that is immediately reviewable. Specifically, the States argue that the

ACO here necessarily "mark[ed] the end of the agency's decisionmaking process on [the] underlying [jurisdictional] determination" because the Ninth Circuit in another case had found that "a jurisdictional finding by the Corps" was its "ultimate administrative position regarding the presence of wetlands." States Br. at 8 (quoting *Fairbanks Northstar Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 592 (9th Cir. 2008) ("*Fairbanks*")). Again, however, this argument simply ignores the fact that the ACO itself makes clear that it does not represent EPA's "ultimate administrative position"; rather, the agency invited petitioners to engage in further discussion to reach such a decision. In contrast, the jurisdictional determination in *Fairbanks* represented the "Corps' considered, definite and firm position about the presence of jurisdictional wetlands on Fairbanks' property." *Fairbanks*, 543 F.3d at 593. Even more important, the States relegate to a footnote in their brief the actual holding of *Fairbanks*: The Ninth Circuit held that the jurisdictional determination in that case was *not* "final" for purposes of judicial review because it failed the second *Bennett v. Spear* hurdle (discussed below at 26-27).[17]

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[17] Notably, the *Fairbanks* holding that agency determinations of CWA jurisdiction are generally *not* final agency action subject to immediate, pre-enforcement judicial review is consistent with the view of other lower courts. *See, e.g., Greater Gulfport Properties, LLC v. U.S. Army Corps of Eng'rs*, 194 F. App'x 250 (5th Cir. 2006); *Comm'rs of Pub. Works of Charleston v. United States*, 30 F.3d 129 (4th Cir. 1994) (table decision); *Acquest Wehrle LLC v. U. S.*, 567 F.Supp.2d 402 (W.D.N.Y. 2008); *St.*

2. The Order was not final because it was not one by which rights or obligations were determined or from which legal consequences flowed.

The Order also fails the second prong of the *Bennet v. Spear* analysis—the requirement of an agency action by which legal rights or obligations are determined and from which legal consequences flow, 520 U.S. at 177-78. Any such rights, obligations, or legal consequences for petitioners would flow only from a contingent, future determination of a CWA violation by a district court judge, following a determination by EPA to prosecute the alleged violation in court. As the court below held, it is well established that Section 1319 "does not authorize the EPA to bring enforcement actions for mere violations of compliance orders." Pet. App. A-12; *see also Hoffman Group*, 902 F.2d at 569 (a party "cannot be compelled to comply with the Compliance Order without an opportunity to challenge the Order's validity in court"). Rather, in order "to enforce a compliance order, the EPA must bring an action alleging a violation of the CWA itself." Pet. App. A-12.

It is true that, *if* EPA chooses to bring a civil enforcement action, and *if* a court finds violations of both the CWA and an ACO, the CWA authorizes the district courts to impose, in theory, fines exceeding the maximum penalty for the underlying CWA violations alone, 33 U.S.C. § 1319(d). Nonetheless, it

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Andrews Park, Inc. v. United States Dep't of the Army Corps of Eng'rs, 314 F.Supp.2d 1238, 1244-45 (S.D. Fla. 2004).

is always the *district court* that must set the amount of any penalty associated with the order, *not* EPA. *See* 33 U.S.C. § 1319(d) (setting forth equitable factors the court "shall consider" in "determining the amount of a civil penalty"). As the government notes in its brief, this is, in practice, "a remote possibility," since courts in wetlands fill cases "rarely impose penalties in an amount that approaches the statutory maximum."[18] SG Br. at 30.

In short, then, it is violating the *CWA*—not anything about the ACO—that subjects petitioners to fines and penalties; if they discharged fill into a water of the United States without a permit, they were in violation of the CWA and subject to a potential civil enforcement action before the ACO issued, and they still are.[19]

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[18] Moreover, although not noted in EPA's brief, presumably EPA would also have to decide to *seek* penalties at such a level for this unlikely scenario to unfold, following issuance of an ACO.

[19] For this reason, *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461 (2004), is distinguishable. As petitioners observe, this Court held in *Alaska Dep't of Envtl. Conservation* ("*ADEC*") that an EPA ACO under the Clean Air Act (CAA) met *Bennett*'s second prong because of the "practical and legal consequences" that flowed from the order, including "vulnerability to penalties." *See id.* at 483. In *ADEC*, however, EPA's order subjected the regulated party to penalties for activity that, absent the order, was expressly authorized under a CAA permit issued by another agency. *Id.*

3. A rule holding ACOs to be final agency actions would undermine EPA's enforcement discretion and create perverse incentives that disserve the interest of all parties.

Today, EPA plainly has discretion to decide whether or not to bring an enforcement action after issuing an ACO. If, however, ACOs are deemed to be final agency action subject to immediate review, the subjects of such orders will have the essentially unilateral ability to force EPA to proceed to enforcement immediately, eliminating the agency's enforcement discretion. *Cf.*, *Heckler v. Cheney*, 470 U.S. 821, 835-36 (1985) (federal Food, Drug, and Cosmetic Act commits "complete discretion" to the agency regarding enforcement).

Such a rule would create a perverse incentive for EPA to remain silent in situations where it believes violations exist unless it is prepared to immediately litigate in federal court. The statute of limitations for civil penalty actions is generally five years. 28 U.S.C. § 2462. During that time, of course, daily penalties for ongoing violations would continue to pile up without the defendant being made aware of that potential liability. In other words, the notice function currently served by issuance of ACOs is actually a *good* thing for parties in petitioners' position. EPA employs ACOs to place such parties, who proceed to construction without seeking a permit from the Corps, on notice that they may be violating the CWA *before* construction gets very far along. Such parties can limit their liability for a continuing violation of the Act by taking corrective action called for by the ACO. If, however, EPA could be sued the moment an

ACO issues, that would be a strong disincentive for the agency to issue such Orders at all, resulting in far greater remediation costs for such parties in many instances.

4. Petitioners should not be rewarded for *failing* to take appropriate steps at the agency.

Petitioners and their *amici* insist that the ACO should be considered final for purposes of judicial review because they do not have any recourse at the agency. But even assuming that petitioners are correct that administrative avenues are now closed to them, it is clear that there were multiple administrative processes they *could* (and should) have followed to achieve a resolution of their concerns, both prior to commencing construction on their property and between commencement of construction and issuance of the ACO.

First, as discussed *supra* at 4, the Army Corps has established a process for obtaining formal determinations of whether a permit would be required to discharge fill material on a particular parcel. *See also* 33 C.F.R. Pt. 331. Nothing in the record suggests that there is anything particularly difficult or expensive about seeking such a determination. Of course, as also discussed above, determinations that the CWA does apply to certain activities on a particular tract of land are not subject to immediate judicial review,[20] but they are a way

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[20] In concluding that a positive jurisdictional determination is not final agency action, the Court need not opine on whether a *negative* jurisdictional determination—*i.e.*, a determination that a given location

that entities and individuals like petitioners may seek a definitive statement of the Government's determination, following formal opportunities to present evidence and pursue an administrative appeal, *see, e.g.*, 33 C.F.R. 331.6(c), regarding the applicability of the CWA to their land, *see supra* at 4-5.

Second, parties may obtain judicial review without exposing themselves to potential penalties by seeking a permit from the Corps and, in the event of an adverse permit decision, obtaining judicial review following the exhaustion of administrative appeals. 33 U.S.C. § 1344(a), 33 C.F.R. Pt. 331. Petitioners could have done so in this case, not only prior to commencing construction, but even afterwards, by applying for an "after-the-fact" permit as allowed under the Corps' regulations. 33 C.F.R. § 326.3(e). Indeed, as noted *supra* at 9, the Corps directly provided Ms. Sackett with an application for such a permit only days after construction began on petitioners' land.

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does not constitute a water of the United States—is a final agency action. Lower courts have held that such negative determinations *are* final agency action because, from the perspective of finality under the APA, they are the functional equivalent of issuing a permit. *See, e.g.*, *Deerfield Plantation Phase II-B Prop. Owners Ass'n, Inc. v. U.S. Army Corps of Eng'rs*, 4:09-CV-01023-RBH, 2011 WL 2746232, *10 (D.S.C. July 12, 2011) (citing *Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313 (4th Cir. 1988)).

II. THIS COURT SHOULD REJECT THE DUE PROCESS CLAIMS OF PETITIONERS AND THEIR *AMICI*.

Petitioners' *amicus* GE presents a particularly unabashed variation of the Sacketts' theme that fairness in this case requires circumvention of the usual hurdles to judicial review. GE expressly urges the Court to abandon the "normally sound practice of resolving cases on the narrowest possible ground" and to turn directly to "the fundamental due process concerns raised by EPA's exercise of it [sic] unilateral order authority and provide guidance regarding the constitutional principles applicable to such administrative schemes generally." GE Br. 10-11. GE's brief, however, not only urges an unnecessarily broad opinion—contrary to the canon of avoiding constitutional questions whenever possible—but its due process arguments (which mirror those of petitioners themselves) are simply wrong.

A. The ACO did not Deprive the Sacketts of a Cognizable Property Interest.

The ACO does not compel the Sacketts to do anything not already compelled by the CWA and it is not self-enforcing: "[T]o enforce a compliance order, the EPA must bring an action alleging a violation of the CWA itself." Pet. App. A-12. The Ninth Circuit's analysis in the *Fairbanks* case is directly on point—whether the CWA applies to petitioners' land, as EPA has opined, or whether petitioners' parcel does not contain waters of the United States that are regulated under the Act, as they maintain, their "legal obligations arise directly and solely from the CWA, and not from [EPA's] issuance" of an ACO. *Fairbanks*, 543 F.3d at 594.

Moreover, EPA's opinion expressed in the ACO, that the property does constitute a "water of the United States," is neither the agency's last word on the subject nor the legal system's last word on the subject. The Order expressly stated that its findings are open to revision pending informal discussion with the Sacketts. In addition, even if EPA maintains its initial opinion, in order to give the order any legal force the agency must still prove up the basis for its finding in court, based on a preponderance of the evidence, at which time the Sacketts are entitled to the most robust "process" provided by the American system of administrative law—an adversarial, adjudicatory hearing before an Article III judge. To date, however, there has been no adjudication of any potential obligations petitioners may have under the CWA and therefore no deprivation of property.

GE's "market" argument revisits its losing position in *GE v. Jackson*, 610 F.3d 110. There GE maintained that a unilateral administrative order ("UAO") issued by EPA under CERCLA (42 U.S.C. § 9696) directing GE to clean up a hazardous waste site violated the due process clause because EPA had acted without first providing a hearing before a neutral decision maker. GE further argued that the "market" effects of the UAO's issuance—allegedly including the lowering of GE's stock price, harming of its brand value, and increasing its costs of financing—constituted an immediate deprivation of property. The D.C. Circuit disagreed, explaining that GE lacked a "legitimate claim of entitlement" to the asserted property. *GE*, 610 F.3d at 308 (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). According to the D.C. Circuit,

consequential injuries resulting from "independent market reactions to the issuance of a UAO" do not merit protection under the due process clause except in extreme cases where such reactions completely destroy the value of the property in question. 610 F.3d at 308-10. In the present case, it is conceivable—albeit barely—that EPA's ACO to the Sacketts gave the markets for "financing," GE Br. 16, better notice of a potential CWA violation than was previously available and that the Sacketts might accordingly face "higher borrowing costs," *id.* at 12, or other consequential damages as a result. But, as the D.C. Circuit held in *GE v. Jackson*, such limited effects on property holders do not constitute deprivation of a property interest within the meaning of the due process clause.

GE's brief to this Court also revisits its *GE v. Jackson* argument that the ACO "violate[s] the holding of *Ex parte Young*, 209 U.S. 123, 147 (1908), that due process precludes fines 'so enormous . . . as to intimidate [parties] . . . from resorting to the courts to test the[ir] validity.'" GE Br. 12. But as the D.C. Circuit held, "statutes imposing fines—even 'enormous' fines—on noncomplying parties may satisfy due process if such fines are subject to a 'good faith' or 'reasonable ground[s]' defense," and the courts have also held that "there is no constitutional violation if the imposition of penalties is subject to judicial discretion." *GE*, 610 F.3d at 307 (internal quotations and citations omitted). It is undisputed here that any CWA fines imposed on the Sacketts by a district court would be subject to a "good faith" defense, 33 U.S.C. § 1319(d), and that the district court would have broad discretion to limit or even

eliminate any fine. *See, e.g., U.S. v. Donovan*, 466 F.Supp.2d at 600.

B. Even if the ACO Affected a Property Interest, Petitioners Have Been Provided Adequate Opportunities for Process.

Petitioners and their *amici* repeatedly suggest that the ACO here violates due process because "EPA has no administrative process the exhaustion of which will produce an action reviewable in court." *See e.g.*, Pet. Br. at 14. As discussed above, however, the CWA's permitting process provides parties the opportunity for review without exposing themselves to potential penalties, and that process *does* lead to judicially reviewable final agency action. Petitioners' objections to that process boil down to (1) they allegedly did not know about it; and (2) the process is supposedly too expensive to count for due process purposes. But just as these objections were insufficient to overcome the need for final agency action to qualify for judicial review—and, moreover, are contradicted by the facts—they also cannot justify the petitioners' failure to pursue the process to which they were entitled.[21]

Moreover, it is clear that EPA's procedures in this case were more than sufficient under the three-part analysis of *Mathews v. Eldridge*, 424 U.S. 319 (1976). As the Fifth Circuit explained in *Buttrey v. U.S.*, 690 F.2d 1170 (5th Cir. 1982), the "fiscal and

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[21] If this Court agrees that the ACO is not a final agency action under the APA, it follows implicitly from this Court's decades of APA jurisprudence that an ACO recipient has no due process right to immediate judicial review of that order.

administrative burdens" prong of that analysis is decisive, as it is unrealistic to think that an agency could grant formal hearings as a matter of course. *Buttrey* involved a developer who *did* seek a permit from the Corps, and requested a formal hearing on the permit. *Id.* at 1173. In addressing the "fiscal and administrative burdens" prong of the due process analysis, the court wrote:

> We understand that a routine imposition of trial-type procedures on the Corps would entail a substantial, and probably unbearable burden. [The Corps] has testified that the Mobile[, Alabama] District alone processes some 1200 [§ 404] applications per year . . . Trial-type hearings, if routinely or even often granted, would not simply impose a "burden" on the Corps. Such a requirement in all likelihood would make it impossible for the Corps to carry out its Congressional mandate under section 404 at all.

Buttrey, 690 F.2d at 1178. In light of these resource issues, the Fifth Circuit concluded that "the Corps should not be required routinely to grant" requests for formal hearings. *Id.*

Perhaps even more relevant here—the Fifth Circuit noted that "[t]he Corps' situation is not atypical." *Id.* Indeed, "[i]n connection with a related water pollution control program, for instance, the Supreme Court has emphasized that if the EPA were required to grant oral hearings in 'most' of its 2200 yearly applications, there would be 'serious questions about the EPA's ability to administer the. . .

program.'" *Id.* (quoting *Costle v. Pac. Legal Found.*, 445 U.S. 198, 215 (1980)). Given the enormous administrative burdens of granting formal hearings in all cases like the one now before this Court—and the availability of informal review as set out in the ACO—petitioners' due process argument must be rejected under the *Mathews v. Eldridge* balancing.

III. IMMEDIATE JUDICIAL REVIEW OF ACOs IS NOT NECESSARY TO ENSURE ADEQUATE JUDICIAL SCRUTINY OF CWA JURISDICTIONAL ISSUES.

Amici Competitive Enterprise Institute and American Petroleum Institute, *et al.*, suggest that the Court should authorize petitioners to seek judicial review of the ACO because it is otherwise difficult to subject questions about the scope of the Clean Water Act to judicial scrutiny. In truth, however, there is no shortage of litigation, on the merits, about whether particular aquatic features constitute "waters of the United States" subject to the CWA. This Court has considered the issue twice in just over a decade, *see Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Rapanos*, 547 U.S. 715, and nearly every federal court of appeal has addressed the scope of the law since this Court's *Rapanos* decision, *see, e.g.*, *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006); *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Cir. 2009); *Donovan*, 466 F.Supp.2d 595; *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278 (4th Cir. 2011); *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008); *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006);

United States v. Bailey, 571 F.3d 791 (8th Cir. 2009); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007); *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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CHANTELL SACKETT, ET AL., *Petitioners*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE WET WEATHER PARTNERSHIP, SOUTH CAROLINA WATER QUALITY ASSOCIATION, NORTH CAROLINA WATER QUALITY ASSOCIATION, WEST VIRGINIA MUNICIPAL WATER QUALITY ASSOCIATION, VIRGINIA ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, AND CITY OF NEW YORK IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. EPA Has Abused its Administrative Order Authority in the Asserted Absence of Pre-Enforcement Judicial Review 7

II. Petitioners May Seek Pre-Enforcement Judicial Review of the Administrative Compliance Order Pursuant to the APA 14

A. The Strong APA Presumption of the Availability of Judicial Review Has Not Been Rebutted 15

B. The Clean Water Act Does Not, on Its Face, Preclude Pre-Enforcement Review 16

C. The Clean Water Act Does Not Implicitly Preclude Pre-Enforcement Judicial Review Under this Court's *Block* Analysis 17

1. The Structure of the Clean Water Act's Statutory Scheme Does Not Indicate a Clear Congressional Intent to Preclude Pre-Enforcement Judicial Review 18

2. Pre-Enforcement Judicial Review is Consistent with the Objectives of the Clean Water Act 21

3. There is No Legislative History To Rebut the Presumption that Review Is Available. 23

4. The Nature of the Administrative Action Involved Supports the Availability of Pre-Enforcement Review 25

D. The Cases on which the Lower Court Relied Are either Inconsistent with Supreme Court Precedent or Based on a Misconception About the Effect of Pre-Enforcement Review on EPA's Ability to Address Environmental Issues Quickly... 26

III. Denial of Pre-Enforcement Judicial Review Violates the Due Process Clause 30

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott Labs. v. Gardner,
387 U.S. 136 (1967) 15, 19, 27

Armstrong v. Manzo,
380 U.S. 545 (1965) 30

Block v. Cmty. Nutrition Inst.,
467 U.S. 340 (1984) 15, 17, 25

Ex parte Young,
209 U.S. 123 (1908) 30

Hilton v. Braunskill
481 U.S. 770 (1987) 23

Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 246 (1981) 12

Hoffman Group, Inc. v. EPA,
902 F.2d 567 (7th Cir. 1990) 26

Laguna Gatuna, Inc. v. Browner,
58 F.3d 564 (10th Cir. 1995) 26, 29

Lloyd A. Fry Roofing Co. v. EPA,
554 F.2d 885 (8th Cir. 1977) 23, 24

MedImmune, Inc. v. Genentech, Inc.,
549 U.S. 118 (2007) 31

New York v. United States,
505 U.S. 144 (1992)..... 12

Nken v. Holder,
129 S. Ct. 1749 (2009)..... 23

Printz v. United States,
521 U.S. 898 (1997)..... 12

Sackett v. EPA.,
622 F.3d 1139 (9th Cir. 2010)..7-8, 18-19, 21, 23-25

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20 F.3d 1418 (6th Cir. 1994)..... 26, 27

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912 F.2d 713 (4th Cir. 1990)..... 26, 27

Tennessee Valley Authority v. Whitman,
336 F.3d 1236 (11th Cir. 2003)..... 32, 33

Constitution, Statutes, and Regulations

U.S. Const. Amend. V 30

5 U.S.C. § 701(a)..... 15

5 U.S.C. § 704 15

33 U.S.C. § 1319(a)(3) 16, 25, 32

33 U.S.C. § 1319(g)..... 20

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40 C.F.R. § 124.10 20

40 C.F.R. §124.19 20

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H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41..... 17

Louis L. Jaffee, *Judicial Control of Administrative Actions* 357 (1965)..... 19, 27

David Montgomery Moore, *Pre-enforcement Review of Administrative Orders to Abate Environmental Hazards*, 9 Pace Envtl. L. Rev 675 (1992)..... 32

Pet'rs' Br. on the Merits..... 30

23 Va. Reg. Regs. 4078 (Aug. 6, 2007)..... 9

INTEREST OF *AMICI CURIAE*

The Wet Weather Partnership ("WWP"), South Carolina Water Quality Association, Inc. ("SCWQA"), North Carolina Water Quality Association, Inc. ("NCWQA"), West Virginia Municipal Water Quality Association, Inc. ("WVMWQA"), Virginia Association of Municipal Wastewater Agencies, Inc. ("VAMWA"), National Association of Clean Water Agencies ("NACWA"), and City of New York, (collectively, "*Amici*"), have received the parties' written consent to file this *amici curiae* brief in support of the Petitioners.[1]

WWP is an association of communities with combined sewer systems from across the country. The WWP seeks environmentally responsible solutions to all urban wet weather issues in a fiscally prudent manner. It is dedicated to ensuring that federal and state water quality regulatory programs are scientifically based, affordable, and cost-effective.

SCWQA is a statewide association of twenty-eight owners and operators of publicly owned treatment works. Its primary purpose is to ensure that federal and state water quality programs are based on sound science and regulatory policy so that its members can protect public health and the

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[1] Under Rule 37.6 of the Rules of this Court, *Amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amici*, their members, or their counsel contributed monetarily to the preparation and submission of this brief. Letters of consent to file this brief are on file with the Clerk of the Court under Rule 37.3.

environment in the most affordable and cost-effective manner possible.

NCWQA is a statewide association of thirty public water, sewer, and storm water utilities throughout North Carolina, serving a significant majority of the sewered population in the state. Its primary purpose is to ensure that federal and state water quality programs are based on sound science and regulatory policy so that its members can protect public health and the environment in the most affordable and cost-effective manner possible.

WVMWQA is a statewide association of thirty owners and operators of publicly owned treatment works. Its primary purpose is to ensure that state and federal water quality programs are based on sound science and regulatory policy so that its members can protect public health and the environment in the most affordable and cost-effective manner possible.

VAMWA is a Virginia non-profit corporation comprising fifty-seven local governments, wastewater authorities, and districts that own and operate wastewater treatment plants throughout Virginia. VAMWA's membership serves approximately ninety-five percent of Virginia's sewered population, as well as business and industry throughout the Commonwealth. For over twenty years, VAMWA has worked to ensure that federal and state water quality programs are scientifically robust, affordable, and cost-effective.

NACWA is a voluntary, non-profit national trade association representing the interests of the nation's publicly owned wastewater and storm water utilities. NACWA's members include nearly three-hundred of the nation's municipal clean water agencies, which collectively serve the majority of the sewered population of the United States. For over forty years, NACWA has maintained a leadership role in legal and policy issues affecting the public authorities responsible for cleaning the nation's wastewater and storm water.

The City of New York is a municipal corporation organized under the laws of the State of New York. The City, through its Department of Environmental Protection ("DEP"), operates a wastewater treatment system that conveys and treats over one billion gallons of wastewater each day, as well as a large municipal separate storm sewer system. The City's system is highly regulated under the Clean Water Act, and DEP has frequent contact with its regulators, including the Environmental Protection Agency ("EPA"). On occasion, the City is subject to administrative compliance orders from EPA, most recently in an order requiring reconstruction of a wastewater conveyance structure in a time frame that was substantially shorter than the time necessary for DEP to both procure the services necessary to repair the structure and complete the repair. As a consequence, the City will be unable to meet the final milestone in the order.

EPA frequently imposes administrative compliance orders on public entities, such as *Amici* and their members, under the same authority as the

order issued to the Sacketts in this case. Such orders, issued without the critical public safeguards of notice, opportunity for comment, and the right of pre-enforcement review, have, not surprisingly, been abused by EPA. Administrative Compliance orders routinely impose obligations costing municipalities tens of millions of dollars of public funds. *Amici* have a significant interest in defending the critical public safeguard and constitutional right of pre-enforcement judicial review of such orders.

SUMMARY OF ARGUMENT

EPA enforcement orders are very threatening and intimidating to recipients, whether a family such as the Sacketts or a major community. They place the recipients in immediate and dire threat of administrative, civil, and criminal sanctions for any non-compliance. While the legal and practical jeopardy in which EPA has put the Sacketts is both legally wrong and grossly unfair, it is just the tip of the iceberg. EPA routinely imposes such quandaries on order recipients nationwide. EPA increasingly asserts this unbridled and unfettered authority to impose requirements outside of the Clean Water Act permitting program and the public safeguards of notice, comment, and judicial review provided therein. EPA's use of administrative orders has also circumvented the significant public safeguards provided by the federal judiciary. This is grossly unfair to permittees and other environmental stakeholders. After all, EPA can order almost anything it pleases—no matter how arbitrary or coercive—without fear of any review whatsoever. Such unrestrained authority is not authorized by the Clean Water Act and, in fact, is inherently inconsistent with its enforcement structure. Moreover, such unbridled authority, devoid of any procedural safeguards, violates the Due Process Clause.

This Court should find that the Clean Water Act does not preclude pre-enforcement judicial review of administrative compliance orders, and, accordingly, review of the order in question is available under the Administrative Procedure Act, 5 U.S.C. § 704. This

conclusion is supported by the structure of the Clean Water Act's statutory enforcement scheme, the statute's objectives, its legislative history, and the nature of administrative compliance orders.

However, if this Court concludes that pre-enforcement judicial review of administrative compliance orders is not available under the Administrative Procedure Act, it should find that denial of pre-enforcement judicial review violates the Due Process Clause of the Fifth Amendment. The Court should find persuasive the Eleventh Circuit's reasoning in *Tennessee Valley Authority v. Whitman*, which concluded that an analogous administrative compliance order provision in the Clean Air Act violated the Due Process Clause of the Fifth Amendment.

ARGUMENT

I. EPA HAS ABUSED ITS ADMINISTRATIVE ORDER AUTHORITY IN THE ASSERTED ABSENCE OF PRE-ENFORCEMENT JUDICIAL REVIEW.

In the absence of pre-enforcement judicial review, EPA has abused its authority to issue administrative compliance orders under the Clean Water Act, 33 U.S.C. § 1319(a)(3), demanding far-reaching injunctive relief from both private parties, such as the Sacketts, and public entities, such as *Amici* and their members. EPA routinely overreaches in its administrative compliance orders, often ordering actions beyond its legal authority in impossibly and, some believe, intentionally short time frames. The Court should uphold the right to pre-enforcement judicial review of administrative compliance orders to provide order recipients with a meaningful opportunity to contest the validity of EPA orders. Otherwise, the agency will continue to use administrative compliance orders to circumvent critical public safeguards set forth in the Clean Water Act, including notice, comment, and judicial review provided in the environmental permitting program.

In this case, EPA issued the Sacketts an administrative compliance order that prohibited them from building a house on their property, required them to restore the property to its original condition, and threatened significant penalties for noncompliance. *Sackett v. EPA*, 622 F.3d 1139, 1141 (9th Cir. 2010). Despite the significant injunctive

relief contained in the order, EPA refused to grant the Sacketts a hearing on whether their property was a wetland within the jurisdiction of the Clean Water Act. *Id.* at 6. While the Sacketts' administrative compliance order required costly actions on behalf of their family, orders which EPA issues to public entities under the Clean Water Act often require injunctive relief on a more massive scale—at the cost of tens or hundreds of millions of dollars of ratepayers' money.

EPA has issued administrative compliance orders to public entities ranging from large cities to the smallest towns, villages, and boroughs. These orders address storm water, wastewater, and other issues varying in scope from narrow allegations of noncompliance to comprehensive, community-wide sewer system rehabilitation and replacement.

An example of a comprehensive order to a large public entity is the forty-three page (plus numerous attachments) administrative compliance order issued to the Hampton Roads Sanitation District ("HRSD"),[2] which required a complete sewer system evaluation and remediation. Hampton Roads Sanitation District, Docket No. CWA-03-2007-0277 (EPA Aug. 1, 2007), *available at* http://www.hrsd.com/pdf/EPA/UAO/AO%20and%20Information%20Request%2008-03-07.pdf. Among other things, the HRSD order required the

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[2] HRSD is a member of one of the *Amici* associations and operates a regional wastewater collection and treatment system serving approximately 1.6 million people in Tidewater, Virginia.

development of a Flow Monitoring Program; a Regional Hydraulic Model and Hydraulic Assessment; a Capacity and Condition Assessment Plan; a modified Management, Operations, and Maintenance program; a Regional Wet Weather Management Plan; a Short Term Wet Weather Operational Plan; a Sanitary Sewer Overflow Emergency Response Plan; and a Public Participation Plan. *Id.* The order also mandated that HRSD coordinate with numerous localities in the region, and it imposed extensive reporting and record keeping requirements. *Id.* The requirements in the HRSD order are both extremely broad and extremely detailed. *See id.* HRSD operates ten wastewater treatment plants subject to National Pollutant Discharge Elimination System ("NPDES") permits, so EPA easily could have gone through the permitting process to mandate these long-term, comprehensive requirements. Instead, EPA resorted to an administrative compliance order, thereby avoiding the public notice, comment, and judicial review safeguards of the permitting process. *Id.* This order is particularly egregious in that EPA issued the order to frustrate the Commonwealth of Virginia's effort to impose a similar state order that had been the subject of public notice and comment during the summer of 2007. *See* 23 Va. Reg. Regs. 4078 (Aug. 6, 2007). There was no need for the EPA order whatsoever as the Commonwealth's order addressed the same issues but came with the added benefit of public notice, comment, and right of appeal. *See id.* No environmental or public-health emergency necessitated EPA's issuance of the order.

Broad compliance orders, with extensive injunctive requirements, are also issued to smaller systems, such as the City of Oak Ridge, Tennessee's Wastewater Treatment Plant and Associated Wastewater Collection and Transmission System. *See* City of Oak Ridge, Tennessee, Docket No. CWA-04-2010-4772 (EPA Sep. 27, 2010), *available at* http://www.cortn.org/PW-html/EPAAdministrative Order.pdf. The Oak Ridge order required extensive, long-term injunctive relief, including: a community-wide Sewer System Evaluation and Rehabilitation Plan, Capacity Assessment Plan, Capacity Assessment Report, Sewer System Evaluation Survey, Wastewater Collection and Transmission System Remediation Plan, Sanitary Sewer Overflow Response Plan, Information and Management System Program, Sewer Mapping Program, Sewer System Design Program, Sewer Construction and Rehabilitation Inspection Program, Continuing Sewer System Assessment Program, Pump Station Performance and Adequacy Program, Infrastructure Rehabilitation Program, Routine Pump Station Operation Program, Emergency Pump Station Operation Program, Electrical Maintenance Program, Mechanical Maintenance Program, Physical Maintenance Program, Pump Station Repair Program, Gravity Line Preventive Maintenance Programs, and Quarterly Reports. *Id.* Seemingly arbitrary deadlines are provided for each requirement, *see id.*, giving the City insufficient time to accomplish the order's objectives. Recipients of orders like Oak Ridge typically are given no opportunity to provide input on the substantive requirements and time frames imposed by such orders.

An order issued to the City of Cedar Rapids, Iowa in 2008 provides an extreme example of the unreasonable deadlines set by EPA in Clean Water Act administrative compliance orders. *See* City of Cedar Rapids, Iowa, Docket No. CWA-07-2008-0029 (EPA Jan. 31, 2008), *available at* http://yosemite.epa.gov/oa/rhc/epaadmin.nsf/Advanced%20Search/F93B3A9FC54B60088525764E0066E4ED/$File/CWA-07-2008-0029.pdf. The Cedar Rapids order required the City to choose an engineering consultant to develop a Sanitary Sewer Collection System Improvements Plan within *one day* from when the order was served on the City. *Id.* This would be impossible for most municipal governments, even in the absence of public procurement requirements. The order further required the system-wide plan to be developed within a mere six months. *Id.* Only sixty days were provided to complete a number of storm water improvements, including dissemination of educational materials to landowners, formalizing pesticide and fertilizer application control and public information and education programs, conducting dry weather inspections of all outfalls, and updating the Storm Water Management Plan and programs. *Id.*

EPA's overreaching in administrative compliance orders is further illustrated by an order issued to the City of Topeka, Kansas in 2010. City of Topeka, Kansas, Docket No. CWA-07-2010-0129 (EPA Oct. 1, 2010) (amended Jan. 27, 2011), *available at* http://yosemite.epa.gov/oa/rhc/epaadmin.nsf/Advanced%20Search/AFCD74DD31994A81852577BD001B82A9/$File/CWA-07-2010-0129.pdf. The order required that the City "enact an ordinance to address post-

construction runoff from new development and redevelopment projects to the extent allowable under state and local law," within ninety days. *Id.* Thus, we have an EPA official issuing a command to a city's legislative council to adopt an ordinance to fulfill state and local (but not federal) law, within ninety days. We do not read the Clean Water Act to make EPA the enforcer of state and local laws. Moreover, the Clean Water Act does not authorize the federal EPA to order local legislative action without any public involvement or judicial review. Such an order is likely unconstitutional. *See New York v. United States*, 505 U.S. 144, 161 (1992) (explaining that the federal government cannot compel a state to enact or administer a federal regulatory program—the same reasoning would apply to cities or other political subdivisions of the states); *Printz v. United States*, 521 U.S. 898, 925-35 (1997) (holding that it is unconstitutional for the federal government to commandeer state officers); *see also Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 246, 288 (1981) (upholding federal environmental cooperative federalism statutes only once the Court found they did not require the states to enforce federal law).

None of these examples of administrative compliance orders address, or are purported by EPA to address, emergencies. Rather, they address collection system and treatment issues that have long been in existence. Each of these issues is a perfect fit for appropriate notice, comment, and review procedures provided by federal law, whether EPA chooses to address such issues through NPDES permits or other Clean Water Act authorities.

Municipalities frequently receive orders that require tens, or even hundreds, of millions of dollars in public expenditures. The following table provides examples of EPA's own estimates of compliance costs for Clean Water Act administrative compliance orders issued to public entities:

Compliance Costs for Clean Water Act Administrative Compliance Orders Issued to Municipalities Included on EPA's Top 25 Civil Enforcement Cases Lists for FY 2006-2010.[3]		
ICIS Enforcement Action Name	Final Order Date	Compliance Costs (FY 2010 $)
Sewerage and Water Board of New Orleans	1/10/2006	164,226,000
City of Richwood	7/19/2006	189,700,000
City of Charlotte, NC	2/13/2007	207,564,000
Hampton Roads Sanitation District	8/1/2007	133,963,500
Metropolitan Wastewater Management Commission, Cities of Eugene & Springfield	3/3/2008	41,067,000
Prasa Puerto Nuevo WWTP, Santurce Sanitary Sewer System	9/5/2008	37,518,000
City of Spencer, Iowa	1/27/2009	32,544,000

[3] EPA, National Enforcement Trends: Top 25 Civil Enforcement Cases in FY 2006 - FY 2010, Based on Estimated Value of Complying Actions to be Taken in Response to EPA's Concluded Enforcement Actions, *available at* http://www.epa.gov/oecaerth/resources/reports/nets/nets-j5-topinjrelfcases.pdf.

Despite the immense expense to which these compliance orders put local governments, their citizens are not provided with opportunities for public notice, comment, or pre-enforcement judicial review. The Clean Water Act does not preclude pre-enforcement judicial review of administrative compliance orders. Moreover, such review is necessary to ensure that EPA does not resort to administrative compliance orders to avoid the extensive public safeguards provided throughout the statute, such as those available in the NPDES permitting process. The NPDES permitting process, rather than administrative compliance orders, should be used to impose such extensive, long-term requirements as called for in these and most other orders.

II. PETITIONERS MAY SEEK PRE-ENFORCEMENT JUDICIAL REVIEW OF THE ADMINISTRATIVE COMPLIANCE ORDER PURSUANT TO THE APA.

EPA has failed to overcome the important presumption under the Administrative Procedure Act ("APA") that judicial review is available to challenge Clean Water Act administrative compliance orders. This important presumption ensures essential and minimum public procedural safeguards against agency action.

A. The Strong APA Presumption of the Availability of Judicial Review Has Not Been Rebutted.

The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Judicial review is available except in the rare circumstances in which Congress has precluded review or committed the action to agency discretion. 5 U.S.C. § 701(a).

In analyzing whether the Clean Water Act precludes pre-enforcement judicial review of administrative compliance orders, the starting point is "the presumption favoring judicial review of administrative action." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). "Clear and convincing evidence" of congressional intent to preclude judicial review is required to overcome that presumption. *Abbott Labs*, 387 U.S. at 141. That intent must be "fairly discernible in the statutory scheme." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 347 (1984). With respect to Clean Water Act administrative compliance orders, "substantial doubt about the congressional intent exists," so the "presumption favoring judicial review of administrative action is controlling." *See id.* at 350-51.

Given the fundamental private interests at stake here for the Sacketts and the hundreds of millions of dollars at stake for *Amici* and their members, the

strong presumption in favor of pre-enforcement judicial review has not been rebutted, and certainly not by any clear and convincing evidence.

B. The Clean Water Act Does Not, on Its Face, Preclude Pre-Enforcement Review.

The Clean Water Act does not explicitly preclude pre-enforcement judicial review of administrative compliance orders. *See* 33 U.S.C. § 1319(a)(3). Congress' failure to specifically and unambiguously prohibit review in the Clean Water Act is significant in that Congress has done so in other statutes. For example, section 113(h) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") provides, "[n]o Federal court shall have jurisdiction . . . to review any order issued under section 9606(a) of this title" except in certain limited circumstances. 42 U.S.C. § 9613(h). The inclusion of this explicit prohibition on judicial review of EPA's CERCLA administrative compliance orders demonstrates that Congress knew how to preclude pre-enforcement judicial review and would have done so explicitly in the Clean Water Act if that was its intention.

The absence of an explicit grant of pre-enforcement judicial review for administrative compliance orders in the Clean Water Act does not imply that pre-enforcement judicial review should be denied. As the House Report in the legislative history of the APA stated:

> To preclude judicial review under [the APA] a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.

H.R. Rep. No. 1980, 79th Cong., 2d Sess., 41, *quoted in Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 156-57 (1970).

C. The Clean Water Act Does Not Implicitly Preclude Pre-Enforcement Judicial Review Under this Court's *Block* Analysis

In addition to express statutory language, this Court has identified the following factors to decide whether a statute implicitly precludes judicial review of an administrative action: "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984). Application of these factors here demonstrates that the Clean Water Act does not preclude pre-enforcement judicial review of administrative compliance orders.

1. The Structure of the Clean Water Act's Statutory Scheme Does Not Indicate a Clear Congressional Intent to Preclude Pre-Enforcement Judicial Review.

The structure of the Clean Water Act does not indicate any legislative intent, and especially not a clear and convincing one, to preclude pre-enforcement judicial review of administrative compliance orders. The Ninth Circuit erroneously concluded that allowing pre-enforcement judicial review would eliminate EPA's choice between issuing an order and bringing a civil action in court because EPA would then end up in court under either option. *See Sackett v. EPA*, 622 F.3d 1139, 1143 (9th Cir. 2010). To the knowledge of the *Amici*, only a very small percentage of NPDES permits are appealed despite a clear right to appeal under the Clean Water Act. The same should be true for reasonable Clean Water Act administrative orders. Daily civil and criminal penalties are so high for non-compliance with administrative compliance orders that they would not be challenged lightly due to the risk of non-compliance penalties accruing during the pendency of the appeal. Litigation costs are a further gate-keeper against frivolous appeals. In all likelihood, a very high percentage of order recipients would choose simply to comply with the order without challenging it in court. Therefore, pre-enforcement judicial review does not in any way undermine EPA's choice between issuing an administrative compliance order, which would likely avoid formal litigation in most cases, and bringing a civil action in district court.

Furthermore, pre-enforcement judicial review of an administrative compliance order would be a substantially different proceeding than a civil action brought by EPA. Review of compliance orders would be subject to deferential review under section 706 of the APA while EPA enforcement through a civil action is a de novo proceeding. Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 Envtl. L. 189, 201-02 (1994). Therefore, "EPA's enforcement options are not eliminated or undermined by allowing review of a compliance order because they each carry different legal effects when reviewed. This difference maintains the integrity of EPA's statutory enforcement options." *Id.* at 202.

The inclusion of judicial review procedures in the Clean Water Act for administrative penalties does not, as the Ninth Circuit found, indicate congressional intent to implicitly preclude judicial review for administrative compliance orders. *See Sackett v. EPA*, 622 F.3d 1139, 1143 (9th Cir. 2010). As this Court has stated, "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) (*quoting* Louis L. Jaffee, *Judicial Control of Administrative Actions* 357 (1965)).

In fact, allowing EPA to exercise unfettered discretion to issue administrative compliance orders in the absence of pre-enforcement judicial review is

inconsistent with the safeguards provided for Clean Water Act administrative penalties issued under 33 U.S.C. § 1319(g). Administrative penalties are subject to public notice and comment, and recipients have an absolute right of appeal. *Id.* Furthermore, the total value of an administrative penalty may not exceed $177,500.[4] 40 C.F.R. § 19.4. Given that administrative penalties have extensive public safeguards despite the strictly limited penalty amounts, it is illogical to interpret the Clean Water Act as denying pre-enforcement judicial review for administrative compliance orders that may impose injunctive relief costing hundreds of millions of dollars. *See supra* Part I.

Insulating administrative compliance orders from pre-enforcement judicial review is inconsistent with the statutory scheme of the Clean Water Act because doing so essentially nullifies the critical public safeguards set forth in other sections of the act. In the municipal context, EPA frequently uses administrative compliance orders to require comprehensive injunctive relief, such as the development of short-term and long-term sewer infrastructure management plans; infrastructure rehabilitation, replacement, and improvement plans; and spending on capital projects. *See supra* Part I. Such requirements are ordinarily included in NPDES permits, which are subject to essential public notice, comment, and appeal procedures. *See* 40 C.F.R. §§ 124.10, 124.19. Allowing EPA to

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[4] In 2007, when EPA issued the administrative order to the Sacketts, the total amount of an administrative penalty was limited to $157,500. 40 C.F.R. § 19.4.

circumvent this process by setting treatment and capital requirements, construction deadlines, and other long-term injunctive relief in administrative compliance orders not subject to judicial review contravenes the public safeguards critical to the Clean Water Act's statutory scheme.

2. Pre-Enforcement Judicial Review is Consistent with the Objectives of the Clean Water Act.

Pre-enforcement judicial review of administrative compliance orders is also consistent with the objectives of the Clean Water Act. Contrary to the Ninth Circuit's view, pre-enforcement review would not inhibit the legislative "goal of enabling swift corrective action." *See Sackett v. EPA*, 622 F.3d 1139, 1144 (9th Cir. 2010). The Ninth Circuit's concern is misplaced. Ironically, there has been no swift corrective action in this case. The same is true for the many administrative compliance orders issued to public entities. In fact, this case is about EPA *not* acting swiftly. By issuing a compliance order to the Sacketts without pre-enforcement review and not bringing a timely enforcement action, EPA left the Sacketts in legal and regulatory limbo to this very day. To enforce the underlying administrative order against the Sacketts, EPA will have to file for an injunction in order to compel or enjoin the action required under the order. Allowing for pre-enforcement review will not result in any delay, but will provide the Sacketts with essential and fundamental due process. In this case, it would have accelerated the restoration of the wetlands in

question, to the extent they are truly wetlands within the regulatory reach of EPA.

Pre-enforcement judicial review of administrative compliance orders would not interfere with EPA's ability to respond promptly to emergencies. Most orders *Amici* and their members have received address non-emergency, long-term public sewer management and infrastructure programs. Moreover, in a true emergency, EPA may seek an injunction or proceed under its emergency powers. The Clean Water Act has a separate "Emergency powers" section authorizing EPA to file suit in district court to deal with situations in which pollution "is presenting an imminent and substantial endangerment" to health or welfare. 33 U.S.C. § 1364. This section demonstrates that Congress envisioned a suit in district court, rather than an administrative compliance order, as the procedure for addressing emergencies presenting an "imminent and substantial endangerment." Allowing pre-enforcement judicial review of administrative compliance orders would have no impact on the congressional scheme for EPA to address emergencies and is more consistent with the statutory structure than precluding pre-enforcement review.

Significantly, pre-enforcement judicial review does not alter the immediate effectiveness of administrative compliance orders. Such orders remain binding on the recipient unless they carry the heavy burden of demonstrating to the court that a stay is warranted. To determine whether a stay is warranted, the courts would weigh (1) the likelihood

of success on the merits; (2) irreparable harm to the recipient if the order is not stayed; (3) harm to other interested parties if the stay is issued; and (4) the public interest. *See Nken v. Holder*, 129 S. Ct. 1749, 1761, (2009) (*quoting Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Therefore, pre-enforcement judicial review would not interfere with the use of administrative compliance orders in the very rare case where EPA truly needs to act quickly. In any event, EPA must resort to the Courts to really compel action, particularly swift action with which the order recipient disagrees—such as the restoration of the alleged wetlands in this case.

3. There Is No Legislative History To Rebut the Presumption that Review Is Available.

Nothing in the legislative history of the Clean Water Act suggests that Congress intended to preclude pre-enforcement judicial review of administrative compliance orders. The inquiry should stop there, and the strong APA presumption that review is available should control.

Unable to find anything in the legislative history of the Clean Water Act itself, the Ninth Circuit resorted to the legislative history of the Clean Air Act. The court pointed to the deletion by the Congressional Conference Committee of a provision in the Senate's version of the Clean Air Act that would have explicitly provided for pre-enforcement review of compliance orders, inferring from that an intent to preclude judicial review. *Sackett v. EPA*, 622 F.3d 1139, 1144 (9th Cir. 2010) (*citing Lloyd A.*

Fry Roofing Co. v. EPA, 554 F.2d 885, 890 (8th Cir. 1977)).

However, even the Ninth Circuit conceded that "[s]uch an inference is not unassailable." *See Sackett v. EPA*, 622 F.3d 1139, 1144 (9th Cir. 2010) (*citing* Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 Envtl. L. 189, 199 (1994)). As the Eighth Circuit noted, the Congressional Conference Committee's report does not provide any explanation for the deletion of the Clean Air Act pre-enforcement judicial review provision. *Lloyd A. Fry Roofing Co.*, 554 F.2d at 890. Furthermore, other plausible explanations for the deletion exist. *See* Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 Envtl. L. 189, 199 (1994). For example, the Conference Committee may have viewed pre-enforcement review to be such a well established right that there was no need to specifically provide for it. *Id.*

A weak, and readily assailable, implication from the legislative history of an entirely different statute is insufficient to demonstrate clear and convincing congressional intent to overcome the strong presumption in favor of pre-enforcement judicial review of Clean Water Act administrative compliance orders.

4. The Nature of the Administrative Action Involved Supports the Availability of Pre-Enforcement Judicial Review.

The Ninth Circuit failed to consider the final factor set forth in *Block* for determining whether a statute precludes judicial review—"the nature of the administrative action involved." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984). The nature of EPA's Clean Water Act administrative compliance orders supports the availability of pre-enforcement judicial review.

Administrative compliance orders frequently involve significant injunctive relief which is extremely costly and time consuming for the recipient. The compliance order issued to the Sacketts prohibited them from constructing a home on their property, required them to undertake costly projects to restore the property to its original condition, and threatened significant civil and criminal penalties for noncompliance. *Sackett v. EPA*, 622 F.3d 1139, 1141 (9th Cir. 2010). Administrative compliance orders issued to municipalities, including some of the *Amici* and their members, require injunctive relief on a much more massive scale, often costing the recipient tens of millions of dollars in public funds to comply. *See supra* Part I. These costly compliance orders may be issued "on the basis of any information" available to EPA. 33 U.S.C. § 1319(a)(3). Recipients are subject to substantial daily penalties for any non-compliance with an administrative compliance order.

The extreme severity of the requirements in administrative orders which EPA imposed on the Sackets and on others, including *Amici* and their members, compels a finding that Congress would not have authorized the issuance of Clean Water Act administrative compliance orders "on the basis of any information" without the essential public safeguard of pre-enforcement judicial review.

D. The Cases on which the Lower Court Relied Are either Inconsistent with Supreme Court Precedent or Based on a Misconception About the Effect of Pre-Enforcement Review on EPA's Ability to Address Environmental Issues Quickly.

The precedents on which the Ninth Circuit based its decision on the preclusion of pre-enforcement judicial review addressed the issue only superficially. *See Laguna Gatuna, Inc. v. Browner,* 58 F.3d 564 (10th Cir. 1995); *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement,* 20 F.3d 1418 (6th Cir. 1994); *S. Pines Assocs. by Goldmeier v. United States,* 912 F.2d 713 (4th Cir. 1990); *Hoffman Group, Inc. v. EPA,* 902 F.2d 567 (7th Cir. 1990).

The Seventh Circuit rested its decision in *Hoffman Group* on the theory that "having provided a detailed mechanism for judicial consideration of a compliance order via an enforcement proceeding, Congress has impliedly precluded judicial review of a compliance order except in an enforcement proceeding." *Hoffman Group,* 902 F.2d at 569. This implicit preclusion reasoning cannot be reconciled

with this Court's holding that "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others." *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) (*quoting* Louis L. Jaffee, *Judicial Control of Administrative Actions* 357 (1965)). And, in fact, the Seventh Circuit made no attempt to reconcile its holding with this binding precedent. The Seventh Circuit also argued that allowing pre-enforcement review would eliminate the choice between an administrative compliance order and a civil action. This ignores both the practical reality that most administrative compliance orders would not be appealed, and the legal distinction between the standards of review applicable to pre-enforcement judicial review and a civil action. *See supra* Part II.C.1.

The Fourth Circuit and Sixth Circuit additionally relied on EPA's need to act quickly to respond to environmental problems, as a basis for finding that the CWA implicitly precludes pre-enforcement review. *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement,* 20 F.3d 1418 (6th Cir. 1994); *S. Pines Assocs. by Goldmeier v. United States,* 912 F.2d 713 (4th Cir. 1990). Ironically, in this case, the dispute centers on the fact that EPA has not acted quickly at all. Instead, EPA elected to use the administrative order to put and keep the Sacketts in legal, regulatory, and financial limbo to this day. The fact that EPA strung the Sacketts along in this way, denying them a pre-enforcement hearing while never bringing an enforcement action, suggests that EPA is (1) uncertain about its determination that the Sacketts' property contained

wetlands subject to Clean Water Act jurisdiction; or (2) seeking to punish the Sacketts by keeping them in legal, regulatory, and financial limbo; or (3) both of the above. Denial of pre-enforcement review provides EPA an unchecked opportunity to act arbitrarily and even in an abusive manner.

Allowing for pre-enforcement judicial review does not impede EPA's ability to quickly address environmental issues. First, if EPA's unbridled administrative order authority is properly subject to review, EPA will be less arbitrary and capricious in writing its orders. Thus, appeals should be rare, just as in other contexts where pre-enforcement review is available. Order recipients are more likely to comply with reasonable orders and avoid risky and expensive litigation. Second, even if an appeal is filed, the order would remain in effect during the judicial review unless the reviewing court issues a stay after the order recipient meets the high burden to warrant a stay. *See supra* Part II.C.2. Additionally, EPA's need to respond promptly in rare cases of true emergencies should not allow an agency to act in an unfettered and arbitrary manner. Any review could be done on an expedited basis if speed was a real concern. In many of the cases cited, the matters at hand represent long standing compliance issues and not a sudden event requiring immediate action without time for review. Again, even where speed is critical, EPA can only compel a recalcitrant order recipient to actually act or refrain from acting through court order.

The concern about EPA's ability to act quickly is a red herring. If the validity of an administrative

compliance order is truly in dispute, EPA will need to bring an enforcement action in court to compel or enjoin the action at issue, hardly a quick process. Additionally, EPA often issues compliance orders in cases such as the Sacketts' when there is no imminent threat. By issuing an administrative order in such a case without allowing for judicial review, EPA may actually compel environmental harm because the recipient will have to violate the order to goad EPA into bringing an enforcement action to allow the recipient to challenge the validity of the order in court.

In *Laguna Gatuna*, the Tenth Circuit offered no additional legal analysis from that identified in the decisions above. *See Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995).

All of these cases ignored the fact that EPA uses administrative compliance orders to avoid the public safeguards provided by the other Clean Water Act civil enforcement options (including the Emergency Powers enforcement authority) and the NPDES permitting process. The Seventh Circuit's finding of implicit preclusion is fatally flawed given this Court's holding in *Abbott Laboratories* and the strong presumption of judicial review absent clear and convincing evidence to the contrary. *See supra* Parts II.A., II.C.1. The Fourth and Sixth Circuits relied on a red herring in focusing on EPA's need to move quickly. Nothing about pre-enforcement review slows EPA down one bit. The agency can still fire off orders. Order recipients will still face immediate non-compliance but could limit that non-compliance period by getting to a stay hearing. In

truly contested issues, EPA still needs the courts to compel or prevent actions. Contrary to the concern of the Fourth and Sixth Circuits, it is only because EPA is not acting quickly here that this case is before this Court so many months after the order in question was issued, without any meaningful attempt by EPA to address the alleged environmental harm (filling of jurisdictional wetlands).

III. DENIAL OF PRE-ENFORCEMENT JUDICIAL REVIEW VIOLATES THE DUE PROCESS CLAUSE.

Pre-enforcement judicial review is required under the Due Process Clause of the Fifth Amendment. U.S. Const. Amend. V. The administrative compliance orders issued to the Sacketts and numerous municipalities, such as *Amici* and their members, exact constitutionally cognizable deprivations of liberty and property interests. *See* Pet'rs' Br. on the Merits 17-19. The Due Process Clause requires that a hearing "be granted at a meaningful time and in a meaningful manner" in response to a deprivation of life, liberty or property. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

This Court has long recognized that "[a] law which . . . impos[es] such conditions upon the right to appeal for judicial relief as work an abandonment of the right rather than face the conditions upon which it is offered or may be obtained is . . . unconstitutional." *Ex parte Young*, 209 U.S. 123, 147 (1908). Stated another way, given a "genuine threat of enforcement," the Court does "not require, as a

prerequisite to testing the validity of the law in a suit for injunction, that the plaintiff bet the farm, so to speak by taking the violative action." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007). Yet that is precisely what the Sacketts face—they must bet their mortgage (not that they could get one in these circumstances). In the absence of pre-enforcement judicial review, to test the order's validity, the Sacketts must bet their home on the invalidity of EPA's order by building the house in violation of EPA's order and, thereby, risking (1) an injunction requiring them to tear down the house, (2) accrual of large daily penalties both for the underlying Clean Water Act violation and for violation of the order itself, (3) potential criminal charges if they proceed to build in an effort to goad EPA into acting, and (4) incurring legal fees on top of what they have incurred so far.

Therefore, "[t]he dynamics of this scheme effectively coerce the alleged violator into compliance" with the agency's unreviewable view of what is required, "whatever the merits of the claim of violation underlying the order." Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 Envtl. L. 189, 189 (1994). The knowledge that the recipient of an invalid order is unlikely to risk the penalties of noncompliance encourages EPA to abuse its power by ordering actions beyond its legal authority. *See supra* Part I (providing examples of how EPA overreaches in its compliance orders). This "scheme" contravenes the Fifth Amendment.

Furthermore, "as a practical matter, review may be denied altogether if EPA never brings an

enforcement action." David Montgomery Moore, *Pre-enforcement Review of Administrative Orders to Abate Environmental Hazards*, 9 Pace Envtl. L. Rev. 675, 695 (1992). EPA can readily "raise the ante"—as they have done to the Sacketts—by delaying an enforcement action and, thereby, subjecting the order recipient to potentially crushing fines and/or criminal liability. Without pre-enforcement review, the ability of EPA to unilaterally delay or deny judicial review of administrative compliance orders violates the Due Process Clause.

In *Tennessee Valley Authority ("TVA") v. Whitman*, the Eleventh Circuit concluded that administrative compliance orders issued under an analogous Clean Air Act provision violated the Due Process Clause of the Fifth Amendment. 336 F.3d 1236, 1258 (11th Cir. 2003). The court explained that the "problem with ACOs stems from their injunction-like legal status coupled with the fact that they are issued without an adjudication or meaningful judicial review." *Id.* at 1241. Under both the Clean Air Act and Clean Water Act, administrative compliance orders requiring extensive injunctive relief may be issued "on the basis of any information available," despite the fact that this standard is less demanding than even a probable cause determination for a warrant. *Id.* (*citing* 42 U.S.C. § 7413(a)(1)); 33 U.S.C. § 1319(a)(3). Additionally, civil or criminal penalties may be imposed for the violation of an administrative compliance order itself, separate from penalties for the underlying statutory violation. *TVA*, 336 F.3d at 1256. This renders the administrative compliance provision "a loophole of

the highest order" because EPA can obtain a conviction for violation of the order without ever having to prove the underlying statutory violation. *Id.* at 1250. The *TVA* court concluded that the "statutory scheme established by Congress—in which the head of an executive branch agency has the power to issue an order that has the status of law after finding, 'on the basis of any information available,' that a [statutory] violation has been committed—is repugnant to the Due Process Clause of the Fifth Amendment." *Id.* at 1258. This Court should apply the Eleventh Circuit's analysis to the similar Clean Water Act administrative compliance order provision. If this Court finds that the Clean Water Act implicitly precludes pre-enforcement review, it must strike that statutory loophole as violative of the Due Process Clause.

CONCLUSION

In the absence of pre-enforcement judicial review, administrative compliance orders have been abused by EPA, at great cost to both private citizens and public entities, and used to avoid the Clean Water Act's critical public safeguards. The Clean Water Act does not expressly or implicitly preclude pre-enforcement judicial review of administrative compliance orders. Even if it did, the inability to seek pre-enforcement judicial review violates the Due Process Clause of the Fifth Amendment in the circumstances of this case and the orders that have been issued to *Amici* and their members.

This Court should reverse the decision of the Ninth Circuit and order the case remanded for a

hearing on the legality of the administrative order in question. The Administrative Procedure Act requires this outcome. Moreover, the Sacketts have been egregiously denied their due process rights.

Respectfully submitted,

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